Supreme Court, U.S.
FILED

09-404 OCT 2 - 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

No.

IN THE

Supreme Court of the United States

YMCA OF METROPOLITAN CHICAGO AND TERRELL C. SANDERSON,

Petitioners,

v.

U.S. BANK, AS TRUSTEE OF THE ROE ANN LOCKHART OBRA '93 TRUST, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

PETITION FOR A WRIT OF CERTIORARI

EDWARD M. KAY
PAUL V. ESPOSITO
CLAUSEN MILLER P.C.
10 South La Salle Street
Chicago, IL 60603
(312) 855 1010

THOMAS G. HUNGAR
Counsel of Record
MIGUEL A. ESTRADA
THOMAS M. JOHNSON, JR.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners
YMCA of Metropolitan Chicago, et al.

QUESTION PRESENTED

Over fifty years ago, this Court held that "[a] trial court should not decide and take final action *ex parte* on information . . . received [from a juror], but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Remmer v. United States*, 347 U.S. 227, 229-30 (1954). Petitioners were defendants in a negligence action and, following a jury trial, received a general verdict in their favor. During trial, the judge had multiple *ex parte* conversations with a deputy sheriff, who allegedly reported that the jury was "in disbelief" from hearing "outbursts" from petitioners' counsel in sidebar conversations. App., *infra*, 34a. The alleged communications between the jury, the deputy sheriff, and trial judge occurred outside the parties' presence and were not revealed to petitioners at any time prior to the verdict. Nevertheless, nearly ten months after the jury was dismissed, the trial judge made factual findings of juror prejudice based on the previously undisclosed *ex parte* contacts and awarded the plaintiff a new trial.

The question presented is whether the Due Process Clause prohibits a trial judge from issuing a ruling that affects substantial rights in reliance on information derived from an *ex parte* communication.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, the Roe Ann Lockhart OBRA '93 Trust was a plaintiff-appellee in the Appellate Court of Illinois and is a respondent in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that YMCA of Metropolitan Chicago has no parent corporation, and that no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT 1

A. Proceedings In The Trial Court 3

B. Proceedings In The Appellate Courts 5

REASONS FOR GRANTING THE PETITION 7

I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DUE PROCESS JURISPRUDENCE 8

A. The Decision Below Is Contrary To The History And Purpose Of The Due Process Clause 8

B. The Decision Below Is Inconsistent With This Court's Prior Decisions Concerning *Ex Parte* Communications Between A Judge And Juror 14

C. The Standard Applied By The Appellate Court Conflicts With The Standard Employed By This Court 19

II. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM STATE COURTS OF LAST RESORT 23

III. THE DUE PROCESS ISSUE THAT HAS DIVIDED THE LOWER COURTS IS RECURRING AND EXCEPTIONALLY IMPORTANT 25

CONCLUSION 27

APPENDIX A: Opinion of the Appellate Court of Illinois (Dec. 31, 2008) 1a

APPENDIX B: Order of the Appellate Court of Illinois Denying Petition for Rehearing (Feb. 19, 2009) 26a

APPENDIX C: Order of the Supreme Court of Illinois Denying Leave to Appeal (May 28, 2009) 28a

APPENDIX D: Order of the Supreme Court of Illinois Denying Motion for Reconsideration (Jun. 24, 2009) 29a

APPENDIX E: Verdict Form (May 5, 2004) 31a

APPENDIX F: Transcript of Proceedings, Circuit Court of Illinois (Feb. 25, 2005) 32a

TABLE OF AUTHORITIES

Page(s)

CASES

Bustamante v. Eyman,
456 F.2d 269 (9th Cir. 1972) 16, 17

Caperton v. A. T. Massey Coal Co.,
129 S. Ct. 2252 (2009) 26

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985) 11

Crawford v. Washington,
541 U.S. 36 (2004) 9, 10

Ex parte R.D.N.,
918 So. 2d 100 (Ala. 2005) 24

Faretta v. California,
422 U.S. 806 (1975) 12

Fillippon v. Albion Vein Slate Co.,
250 U.S. 76 (1919) 15, 16, 17, 20

Grannis v. Ordean,
234 U.S. 385 (1914) 11

Greene v. McElroy,
360 U.S. 474 (1959) 8, 10, 13, 14, 26

Hagar v. Reclamation Dist. No. 108,
111 U.S. 701 (1884) 11

Hopt v. Utah,
110 U.S. 574 (1884) 11, 22

In re Oliver,
333 U.S. 257 (1948) 9

Kentucky v. Stincer,
482 U.S. 730 (1987) 12, 22

Louisville & Nashville R.R. Co. v. Schmidt,
177 U.S. 230 (1900) 11

Mathews v. Eldridge,
424 U.S. 319 (1976) 11

Morgan v. United States,
304 U.S. 1 (1938) 12, 13

Remmer v. United States,
347 U.S. 227 (1954) 1, 15, 16, 19, 20

Rushen v. Spain,
464 U.S. 114 (1983) 16, 17, 18

Shields v. United States,
273 U.S. 583 (1927) 15, 16, 17

Snyder v. Massachusetts,
291 U.S. 97 (1934) 2, 11, 14, 18, 19, 21, 22

S. Ry. Co. v. Virginia,
290 U.S. 190 (1933) 12, 20

United States v. Gagnon,
470 U.S. 522 (1985) 2, 7, 17, 18, 19, 21, 22, 23

United States v. Gordon,
829 F.2d 119 (D.C. Cir. 1987) 17

United States v. Nixon,
418 U.S. 683 (1974) 25

United States v. U.S. Gypsum Co.,
438 U.S. 422 (1978) 26

United States v. Washington,
705 F.2d 489 (D.C. Cir. 1983) 17

Whitney Nat'l Bank v. Smith,
613 So. 2d 312 (Miss. 1993) 24

Willner v. Comm. on Character & Fitness,
373 U.S. 96 (1963) 2, 13, 14, 20

Yost v. Johnson,
591 A.2d 178 (Del. 1991) 23, 24

STATUTES

28 U.S.C. § 1257(a) 1

RULES

Fed. R. Crim. P. 43(a) 17

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 10

U.S. Const. amend. XIV, § 1 1

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004) 19

William Blackstone, *Commentaries on the Laws of England* (1768) 10

Matthew Hale, *The History of the Common Law* (5th ed. 1794) 10

Emory Washburn, *The Court of Star Chamber*, 12 Am. L. Rev. 21 (1877) 9

22 Wright & Graham, *Federal Practice and Procedure: Evidence* (1978) 10

PETITION FOR A WRIT OF CERTIORARI

Petitioners YMCA of Metropolitan Chicago and Terrell C. Sanderson (collectively, "YMCA") respectfully submit this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First District (App., *infra*, 1a-25a) is not yet published but is electronically reported at 2008 WL 5454246. The order of the Supreme Court of Illinois denying YMCA's petition for leave to appeal (App., *infra*, at 28a) is published at 232 Ill. 2d 597.

JURISDICTION

The opinion of the Appellate Court of Illinois, First District, was entered on December 31, 2008. The order of the Supreme Court of Illinois denying leave to appeal was entered on May 28, 2009. On August 10, 2009, Justice Stevens extended the time for filing a petition for a writ of certiorari until October 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

This Court has held that *ex parte* communications between a judge and juror are "presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227,

229 (1954). Indeed, such communications violate the Due Process Clause whenever the defendant's presence has a "relation, reasonably substantial," to the opportunity to mount a full and fair defense. *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (*per curiam*) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 108 (1934)); *see also Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103 (1963). This case presents the question whether due process is violated when a trial judge bases a judgment-altering ruling on *ex parte* communications from the jury—an important federal question that has divided the state appellate courts.

The trial court violated the YMCA's due process rights by basing factual findings of juror prejudice on undisclosed *ex parte* communications and using those findings to invalidate a jury verdict and grant the plaintiff a new trial. The appellate court then rejected the YMCA's due process challenge to the new-trial order, holding that a trial court is entitled to rely on *ex parte* conversations as long as the record does not "directly contradict[]" the trial judge's "recollection" of those discussions. App., *infra*, 14a. The appellate court's holding—that a trial judge has broad discretion to rely on *ex parte* communications as long as there is no contrary record evidence—turns this Court's presumption against the use of *ex parte* evidence on its head. The appellate court's opinion conflicts with numerous precedents of this Court, such as *Snyder*, *Willner*, and *Gagnon*, as well as opinions from several state supreme courts. This Court should grant review to resolve the split in authority and to clarify that a trial judge cannot rely on *ex parte* communications to alter the outcome of a trial.

A. Proceedings In The Trial Court

Respondent U.S. Bank ("plaintiff"), as guardian and representative of the estate of Roe Ann Lockhart, sued the YMCA in negligence for damages sustained in a traffic accident. App., *infra*, 2a. The case went to trial in the Circuit Court of Cook County, Illinois, and on May 5, 2004, the jury returned a general verdict for the YMCA. *Id.* at 31a.

After the verdict, plaintiff moved for a new trial, raising a variety of grounds, including an assertion (made for the first time in the case) that the YMCA's counsel had made accusations of unfair treatment in sidebar conversations that were audible to the jury. *Id.* at 3a-4a. On September 7, 2004, the trial court held a hearing on plaintiff's motion. There was no mention, either before or during the hearing, of any *ex parte* communications with the jury concerning defense counsel's allegedly prejudicial statements.

The court did not rule on plaintiff's motion immediately; rather, over a month later, the court *sua sponte* ordered the parties to submit to mediation—which failed to reach a settlement. *Id.* at 4a. Then, on February 25, 2005, after settlement negotiations had reached a stalemate and nearly ten months after the jury was dismissed, the court vacated the judgment on the verdict and ordered a new trial. *Id.* at 32a-35a.

The trial court based its new-trial ruling on its finding that the jury had overheard, and was prejudiced by, off-the-record comments made by the YMCA's counsel in sidebar conversations. Although the court asserted that the transcript was "replete" with "prejudicial comments and actions," it did not identify any in its ruling. *Id.* at 33a. Rather, the court found that the contentious sidebar conversations were audible to the jury based in part on his own "direct observation," which "the transcript . . .

does not reflect," of the court's efforts to prevent the jury from overhearing. *Id.* He further found—on the basis of multiple *ex parte* conversations with the courtroom's deputy sheriff (who served as bailiff and in turn was reporting his alleged *ex parte* conversations with jurors) that the allegedly overheard remarks were prejudicial in light of their impact on the jury:

> [T]he comments off the record that the jurors heard were very prejudicial to the Plaintiff, as reported on several occasions by the sheriff to myself that the jury was in disbelief from hearing these outbursts.

Id. at 34a.

The court did not alert the parties or their counsel to the *ex parte* comments during the trial, after the verdict, at the hearing on post-trial motions, or at any time in the ten months between the jury's dismissal and the new-trial ruling. Therefore, as the court conceded, it was impossible to know whether the sidebar comments affected the outcome of the trial: "The outcome, the verdicts could have, might have been the same. I and we will never know." *Id.*

The YMCA promptly sought leave to appeal the new-trial order to the Appellate Court of Illinois, arguing *inter alia* that the trial court's reliance on secret, *ex parte* communications with members of the jury violated the YMCA's "due process rights to a fair and open proceeding." YMCA Pet. for Leave to Appeal Pursuant to Sup. Ct. R. 306(a)(1) at 17. The appellate court denied leave to appeal the interlocutory order. App., *infra*, 2a. The YMCA then sought leave to appeal the order to the Supreme Court of Illinois, again raising the due process issue. YMCA Pet for Leave to Appeal Pursuant to Sup. Ct. R. 315(a) at 11. The Supreme Court of Illinois likewise denied leave to appeal. App., *infra*, 2a.

Thereafter, a second trial followed before a different jury, which resulted in a verdict for plaintiff in the amount of $15,468,277, after a reduction for comparative negligence and setoff for prior payments. App., *infra*, 12a.[1] The YMCA appealed the judgment to the Appellate Court of Illinois, arguing *inter alia* that the violation of its "due process rights to a fair and open proceeding" following the first trial required reinstatement of the initial jury verdict. YMCA App. Ct. Br. 31.

B. Proceedings In The Appellate Courts

The Appellate Court of Illinois affirmed. App., *infra*, 1a-25a. The appellate court rejected the YMCA's due process challenge to the trial court's failure to conduct a "formal inquiry after being told by the deputy sheriff of the jurors' comments." *Id.* at 14a. According to the appellate court, "[the] YMCA points to no support for its argument that a formal inquiry by the trial court was required." *Id.*

Finding no legal error in the trial court's decision to base its ruling on *ex parte* communications (*see* App., *infra*, 12a-13a), the court reviewed the trial court's *ex parte* factual findings for abuse of discretion. *Id.* at 12a. "This deferential standard is applied," the court reasoned, "because it is the trial court which is in the unique position of being able to observe the witnesses and how they testified, as well as all the other circumstances relating to their credibility." *Id.*

---

[1] Prior to jury selection in the second trial, plaintiff voluntarily dismissed the driver, Terrell Sanderson, from the lawsuit. App., *infra*, 2a. The verdict in the first trial, however, was rendered in favor of Sanderson as well as the YMCA of Metropolitan Chicago, and if reinstated, would vindicate both parties.

Therefore, the appellate court held that "[a] trial court [is] permitted to rely upon its recollection[]" unless "the trial court's recollection [is] directly contradicted by the record." *Id.* at 14a. The court conceded that it was "unfortunate that the trial court did not inform the attorneys when his deputy sheriff informed him of the jurors' comments." *Id.* at 16a. Nevertheless, because the record did not contradict the trial judge's "recollection" that the sidebar comments "did in fact prejudice [plaintiff]"—a "recollection" based entirely on the bailiff's *ex parte* reports of the jury's statements—the appellate court upheld the ruling granting plaintiff a new trial. *Id.* at 17a.[2]

The YMCA filed a petition for rehearing, arguing that the YMCA's "rights to due process were violated by [the trial court's] decision and this Court's opinion continues to violate those rights by sanctioning conduct that is the antithesis of due process guaranteed by both the United States and the Illinois Constitutions." YMCA Pet. for Rehearing at 1. The appellate court denied the petition for rehearing. App., *infra*, 27a-28a.

The YMCA again petitioned the Supreme Court of Illinois for leave to appeal, arguing that the appellate court's decision "cannot stand under the scrutiny of the due process rights guaranteed the YMCA by both federal and state constitutions and decisional law." YMCA Pet. for Leave to Appeal at 9. The supreme court again denied leave to appeal. App., *in-*

---

[2] The appellate court also relied on the fact that the judge's findings based on *ex parte* communications "were accompanied by comments regarding his own observations." App., *infra*, 16a. The *ex parte* communications, however, were the sole basis for the trial court's finding that plaintiff was actually prejudiced by the allegedly loud sidebar comments. *See id.* at 32a-35a. In addition, as the trial judge conceded, his personal observations do not appear in the trial record. *Id.* at 33a.

fra, 28a. The YMCA moved for leave to file a motion for reconsideration, which was also denied. *Id.* at 29a-30a.

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to resolve the profoundly important question whether a judge's reliance on off-the-record, *ex parte* communications to alter the outcome of a trial violates the Due Process Clause or is instead permissible in the absence of contradictory record evidence. That question has divided the state appellate courts and is of recurring significance in litigation across the Nation. The prohibition against *ex parte* communications has deep roots in English common law and American jurisprudence—including prior decisions of this Court. The appellate court's decision, which granted trial courts broad discretion to rely on *ex parte* communications to award a new trial, conflicts with this Court's standard for evaluating *ex parte* communications and with decisions of several state courts of last resort.

In *Gagnon*, 470 U.S. 522, this Court acknowledged due process limitations on *ex parte* contacts between a judge and jury, but found that the particular contacts at issue were too peripheral to the trial to violate the Constitution. Here, by contrast, there is no need to speculate whether the *ex parte* communications influenced the factfinder or whether that influence prejudiced the YMCA; rather, the trial court's ruling makes plain that it overturned the YMCA's favorable jury verdict based on factual findings derived from impermissible *ex parte* discussions. This case thus presents an ideal vehicle for the Court to identify the circumstances in which judicial reliance on *ex parte* communications violates due process.

I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DUE PROCESS JURISPRUDENCE

The Due Process Clause guarantees that, "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the . . . case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). In this case, the Illinois courts deprived the YMCA of a favorable verdict based on a factual finding of juror prejudice. That finding derived from *ex parte* contacts with undisclosed members of the jury and the bailiff, which were kept hidden from the YMCA until long after trial, when the court overturned the verdict. The appellate court then cloaked these unilateral findings with highly deferential "abuse of discretion" review—a standard reserved for facts that have been tested in open court through the adversary presentation of evidence. The appellate court's ruling granting the trial court broad discretion to rely on *ex parte* evidence to alter the outcome of a trial violates core historical notions of due process, and conflicts with *Gagnon*, *Greene*, and other longstanding precedents of this Court.

A. The Decision Below Is Contrary To The History And Purpose Of The Due Process Clause

The due process prohibition on *ex parte* communications between witnesses and officers of the Court has origins deep in English and early American law and history. "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star

Chamber, and to the French monarchy's abuse of the *lettre de cachet*." *In re Oliver*, 333 U.S. 257, 268-69 (1948). A common link in these historical examples of arbitrary judicial power was the decision-maker's ability to examine witnesses or other evidence in secret without providing the accused with an opportunity to be heard. *See, e.g., id.* at 268 n.21 (during the Inquisition, the "questioning of witnesses . . . [was] conducted in secret"); *id.* at 269 n.22 (in the Court of Star Chamber, "witnesses against the accused were examined privately with no opportunity . . . to discredit them") (citing authorities); *id.* at n.23 (*lettres de cachet* provided an accused with no "trial or . . . opportunity to defend himself").[3] In one particularly egregious example well known to the American colonists, Sir Walter Raleigh was convicted of treason based on an alleged accomplice's *ex parte* testimony before the Privy Council and in a written letter—despite Raleigh's request to bring the accuser into open court. *See Crawford v. Washington*, 541 U.S. 36, 44 (2004). A judge in Raleigh's Case later lamented that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." *Id.* (internal citation omitted).

In reaction to these historical abuses, the English common law gradually evolved to provide for public examination of witnesses before the accused. As Blackstone observed, "[the] open examination of witnesses *viva voce*, in the presence of all mankind,

---

[3] *See also* Emory Washburn, *The Court of Star Chamber*, 12 Am. L. Rev. 21, 25 (1877) ("Every one familiar at all with the trial of causes knows how vastly superior in eliciting the truth is . . . an oral examination of witnesses in the presence of [the parties, the jurors, and] the court to an *ex parte* one taken in the form of depositions. And yet [in the Court of Star Chamber] the latter was the mode in which all evidence was taken which was submitted to this court.").

is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk . . . : where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn trial." William Blackstone, 3 *Commentaries on the Laws of England* 373 (1768). Hale likewise applauded the development of the modern English system whereby evidence was presented in open court, "in [the] presence of the judge, jury, parties and counsel," rather than "in private before a commissioner or two, and a couple of clerks; where oftentimes witnesses will deliver that, which they will be ashamed to testify publicly." Matthew Hale, 2 *The History of the Common Law* 145 (5th ed. 1794). In sum, "[t]he common-law tradition is one of live testimony in court subject to adversarial testing, while the [continental] civil law condone[d] examination in private by judicial officers." *Crawford*, 541 U.S. at 43.

The founding generation sought to prevent the reoccurrence of abuses like the Star Chamber through enactment of the Bill of Rights—for example, the Confrontation Clause of the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also Crawford*, 541 U.S. at 49. In the civil context, the Due Process Clause of the Fifth and Fourteenth Amendments protects the fundamental rights of litigants to be present and to confront adverse witnesses. *See Greene*, 360 U.S. at 496 & n.25, 497 (noting that these rights have "ancient roots" in Roman law and apply under the U.S. Constitution "not only in criminal cases, but also in all types of cases where administrative and regulatory actions [are] under scrutiny") (internal citations omitted); 22 Wright & Graham, *Federal Practice and Procedure:*

Evidence § 5195, at 202 (1978) ("[t]hough by its own terms the Sixth Amendment right is limited to criminal cases, it has been held that a right of confrontation is a requirement of due process and as such is applicable in proceedings that are not criminal in nature").

Thus, from an early date, this Court recognized that the core requirements of due process include "notice and an opportunity to be heard." *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 709 (1884); *see also Louisville & Nashville R.R. Co. v. Schmidt*, 177 U.S. 230, 236 (1900) (due process requires that "the person condemned has . . . sufficient notice and adequate opportunity has been afforded him to defend"); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").[4] Early precedents also recognized that the Due Process Clause protects the right of a defendant to be present at all stages of a proceeding that could affect the defendant's rights in the litigation. *See, e.g.*, *Hopt v. Utah*, 110 U.S. 574, 579 (1884) (noting in dicta that due process encompasses the right of the defendant to "be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him").

Then, in *Snyder v. Massachusetts*, this Court explained that "the presence of a defendant is a condition of due process to the extent that a fair and just

---

[4] These requirements remain the foundation of this Court's due process jurisprudence. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (internal citation omitted); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (same).

hearing would be thwarted by his absence . . . ." 291 U.S. at 107-08. The Court has continued to affirm in more recent cases that a defendant has the right to be present at all critical stages of a trial proceeding. *See, e.g.*, *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (as a matter of "due process of law," "[i]t is now accepted . . . that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings"); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (the Due Process Clause "guarantee[s] the [defendant's] right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure").

This Court has applied these general due process principles in a variety of circumstances in civil cases to prevent decision-makers from relying on *ex parte* evidence that would affect the rights of parties or the fairness of a hearing. For example, in *Southern Railway Company v. Virginia*, 290 U.S. 190 (1933), the Court held that it violated due process for a State to empower an administrative officer to "make final determination in respect of facts" relating to the safety of railway crossings, and based on these "*ex parte* finding[s], not subject to general review, to ordain that expenditures shall be made [by the railroad] for erecting" an overhead passage. *Id.* at 194-95. Similarly, in *Morgan v. United States*, 304 U.S. 1 (1938) (*per curiam*), this Court considered whether reliance on *ex parte* evidence was consistent with Congress's requirement of a "full hearing" under the Packers and Stockyards Act. The Court held that in requiring a "full hearing," Congress had incorporated "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." *Id.* at 19. Therefore, the Court concluded that it was a "vital defect" for the Secretary of Agriculture to fix maximum rates to be charged by

market agencies based on findings drafted by the government prosecutors "after an *ex parte* discussion with them and without according any reasonable opportunity to the [market agencies] to know the claims thus presented and to contest them." *Id.* at 22.

In *Greene*, the Department of Defense had revoked an aeronautical engineer's security clearance, which made it impossible for him to find work in the field, based on confidential informants who allegedly testified that the engineer associated with members of the Communist Party. 360 U.S. at 487-89. Because neither Congress nor the President had expressly authorized the Department to deny security clearances based on information derived from secret informants, this Court "assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." *Id.* at 507. Given those safeguards, the Court concluded that the Department had improperly exceeded its authority by depriving the engineer of his livelihood "on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure," including "the safeguards of confrontation and cross-examination." *Id.* at 508.

Finally, in *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963), this Court held that it violated due process to deny an applicant bar admission based, "at least to some extent," on adverse *ex parte* statements that were not tested by a hearing and opportunity to confront adverse witnesses. *Id.* at 101, 106. The applicant challenged the constitutionality of this procedure, but the state courts rejected his challenges without extended analysis. *Id.* at 101-02. This Court reversed. The Court noted that it "ha[d] emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person

of his livelihood." *Id.* at 103 (citing *Greene*, 360 U.S. at 492, 496-97). Therefore, "the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this." *Id.* at 104.

The trial court's ruling in this case offends the purpose and storied history of the Due Process Clause because the trial judge relied on factual findings of juror prejudice—obtained through *ex parte* conversations outside the presence of the parties or their counsel—to grant plaintiff a new trial. The appellate court, in turn, disregarded the longstanding tradition against reliance on *ex parte* communications by holding that trial judges possess discretion to base dispositive rulings on *ex parte* communications.

This Court should grant review because the appellate court's decision ratifying the discretionary use of *ex parte* evidence not "directly contradicted by the record" (App., *infra*, 14a) conflicts with numerous decisions of this Court affirming the foundational due process requirements of notice, personal presence, and an opportunity to be heard at all critical stages of a trial proceeding. Certiorari is also warranted to clarify that, where a factfinder's reliance on *ex parte* communications affects a party's substantial rights, a defendant has been deprived of its historical right to a "fair and just hearing." *Snyder*, 291 U.S. at 108.

B. The Decision Below Is Inconsistent With This Court's Prior Decisions Concerning *Ex Parte* Communications Between A Judge And Juror

A specific line of this Court's precedents dating back 90 years has repeatedly affirmed that *ex parte* communications between a judge and jury violate a

defendant's right to a fair hearing—as a matter of trial procedure and constitutional due process. The appellate court's ruling conflicts with the letter and spirit of these cases.

In *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919), a civil action for negligence, the jury asked the judge during deliberations to clarify the proper standard for contributory negligence, and the judge responded with a written instruction—outside the presence of, and without notice to, the parties or their counsel. This Court held, using language sounding in due process, that the judge's actions violated the defendant's "right to be heard." *Id.* at 81. "We entertain no doubt," the Court wrote, "that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." *Id.* at 81.

The Court returned to this issue in *Shields v. United States*, 273 U.S. 583, 584 (1927). In that case, a jury sent a note to the trial judge indicating it was deadlocked with respect to defendant Shields, and the judge responded with a written request that the jury continue deliberations—but the entire exchange took place outside the presence of Shields or his counsel. Even though defense counsel had previously asked the judge to hold the jury until it reached a decision, the Supreme Court held, relying on *Fillippon*, that the "rule of orderly conduct of [a] jury trial" was violated when the judge sent the reply in the defendant's absence. *Id.* at 588-89.

Perhaps the Court's clearest condemnation of *ex parte* communications between judge and jury occurred in *Remmer v. United States*, 347 U.S. 227 (1954). In *Remmer*, a juror reported to the judge

that he had been contacted by an unnamed person who told the juror he could profit by returning a favorable verdict for the defendant. *See id.* at 228. The judge, in consultation with the prosecutors, but without informing the defendant, asked the FBI to conduct an investigation into the allegations. *See id.* The investigation revealed that the inducement was likely not serious, and the juror remained on the panel, which ultimately returned a verdict against the defendant. *See id.*

Upon learning of the investigation, the defendant filed a motion for a new trial, which the district court denied. *See id.* at 228-29. This Court reversed, reasoning that "any private communication . . . with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial[.]" *Id.* at 229. "The trial court should not decide and take final action *ex parte* on information . . . received [from a juror], but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 229-30.

Because some of these early cases may have rested their holdings on "non-constitutionally based rules of orderly trial procedure," *Rushen v. Spain*, 464 U.S. 114, 120 n.4 (1983) (*per curiam*) (describing *Fillippon* and *Shields*) (dicta), rather than the Due Process Clause itself, "it has seldom been necessary to plumb the federal constitutional depths of the principle" that there are due process limits to *ex parte* communications between a judge and jury. *Bustamante v. Eyman*, 456 F.2d 269, 272 (9th Cir. 1972). "Nevertheless, that the principle is embodied in the Constitution of the United States is clear."

Id.[5] Indeed, there can be no doubt, after this Court's decisions in *Rushen* and *Gagnon*, that the Due Process Clause places limitations on *ex parte* communications between a judge and jury.

In *Rushen*, the prosecution in a criminal trial introduced evidence of an unrelated murder to impeach a witness, which distressed one of the jurors who knew the murder victim personally. 464 U.S. at 115. The juror had two *ex parte* conversations about the murder with the judge, who concluded that the matter was peripheral to the facts of the case and would not affect her impartiality. *Id.* at 116. The defendants were convicted, and argued in a new trial motion and on appeal that the *ex parte* communications violated their rights to personal presence and counsel. *Id.* at 117.

This Court acknowledged that "[o]ur cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." *Id.* at 117. Further, the Court noted that "[w]hen an *ex parte* communication relates to some aspect of the trial, the trial judge generally should disclose the

---

[5] For example, the history of Federal Rule of Criminal Procedure 43(a) provides evidence that cases like *Fillippon* and *Shields* reflect this Court's early understanding of constitutional limits on *ex parte* communications. The Rule, adopted in 1944, provides that a criminal defendant has a right to be present "at . . . every trial stage, including jury impanelment and the return of the verdict." Fed. R. Crim. P. 43(a). Courts have observed that the Rule codified prior case law, and "embodies the protections afforded by the sixth amendment confrontation clause, the due process guarantee of the fifth and fourteenth amendments, and the common law right of presence." *United States v. Gordon*, 829 F.2d 119, 123 (D.C. Cir. 1987); *see also United States v. Washington*, 705 F.2d 489, 496 (D.C. Cir. 1983) (same).

communication to counsel for all parties." *Id.* at 119. Nevertheless, the Court found that on the facts before it, the *ex parte* communications were harmless error, because the conversations were "innocuous" and unrelated to the facts and law of the case. *Id.* at 121.[6]

Then, in *Gagnon*, a bailiff informed the trial judge that a juror had expressed concern that Gagnon, one of four criminal defendants, was sketching portraits of the jury. 470 U.S. at 523. The judge conducted an *in camera* interview with Gagnon's counsel and the juror, which concluded that the juror could be impartial and remain empanelled. *Id.* at 524. The defendants were convicted, and on appeal the Ninth Circuit held that the *in camera* discussion violated the defendants' due process right to be personally present at all stages of the trial. *Id.* at 524-25.

This Court acknowledged that a defendant has a due process right to be present at a proceeding whenever such presence has a "relation, reasonably substantial, to the fulness of his opportunity to defend against [a] charge," or "a fair and just hearing would be thwarted by his absence . . . ." *Gagnon*, 470 U.S. at 526 (quoting *Snyder*, 291 U.S. at 105-06, 108). The Court concluded, however, that on the specific facts of that case, no due process violation had occurred: The sketching incident was a "short interlude in a complex trial," "a minor occurrence," and the defendants could not have gained anything by being personally present. *Id.* at 527.

---

[6] The Court assumed, without deciding, that the *ex parte* conversations violated the Constitution, and considered only whether the error was harmless. *See* 464 U.S. at 117 n.2.

C. The Standard Applied By The Appellate Court Conflicts With The Standard Employed By This Court

The decision below conflicts with the principles articulated in cases like *Snyder* and *Gagnon*, because it upholds the power of a trial court to predicate a dispositive ruling on *ex parte* evidence about the impact of particular conduct on the jury. This Court's precedents make plain that reliance on *ex parte* evidence is "presumptively prejudicial," *Remmer*, 347 U.S. at 229, and that a defendant has a right to be present whenever presence has a "reasonably substantial" relation to mounting a full and fair defense, *Gagnon*, 470 U.S. at 526 (quoting *Snyder*, 291 U.S. at 105). The court below, however, adopted and applied a contrary presumption, holding that a trial judge has broad discretion to grant a new trial based on *ex parte* evidence as long as the judge's factual findings are not "directly contradicted" by the record. App., *infra*, 14a.

The appellate court's rule would eviscerate this Court's longstanding distrust of reliance on secret, *ex parte* evidence and make it impossible for parties like the YMCA to create a meaningful record for appellate review. By definition, *ex parte* communications occur without notice to the adversely affected party. *See Black's Law Dictionary* 616 (8th ed. 2004) (defining an *ex parte* action in part as "[d]one . . . for the benefit of one party only, and without notice to, or argument by, any person adversely interested"). Parties in the YMCA's position have no ability or incentive to create a factual record to refute unknown and unknowable *ex parte* statements. The trial court compounded this difficulty through its belated reliance on *ex parte* communications to grant plaintiff a new trial many months after the verdict was returned and the jury dismissed. As the trial judge

admitted, at that point in time it was impossible for the YMCA to evaluate the impartiality of the verdict: "The outcome, the verdicts could have, might have been the same. I and we will never know." App., *infra*, 34a.

Under such circumstances, the record will rarely, if ever, "directly contradict[]" previously undisclosed *ex parte* communications. Here, the record does not reflect the two key factual predicates of the trial court's ruling—that the jurors (a) overheard the parties' sidebar discussions, and (b) were prejudiced as a result. As the trial judge conceded, the "transcript . . . does not reflect" his "direct observation" of the court's inability to prevent the jurors from overhearing the sidebar discussions. App., *infra*, 33a. And of course, the *ex parte* conversations between the judge, deputy sheriff, and jury appear nowhere in the record. Therefore, the appellate court had no valid basis on which to uphold the trial court's factual findings, and certainly no basis to apply a "deferential standard" to such findings. *Id.* at 12a.

By contrast, this Court has deemed *ex parte* contacts between a judge and juror "presumptively prejudicial" and found that reliance on *ex parte* evidence violates the Constitution in circumstances where it would undermine the fairness of proceedings or affect the rights of litigants. *See, e.g.*, *S. Ry. Co.*, 290 U.S. at 194-95; *Willner*, 373 U.S. at 101, 106; *see also Fillippon*, 250 U.S. at 81; *Remmer*, 347 U.S. at 229. In *Southern Railway Company* and *Willner*, the Court did not inquire whether the facts derived from the *ex parte* communications were refuted by record evidence; rather, it was sufficient that the factfinder relied on such evidence without providing the adversely affected party with notice and an opportunity to be heard. The appellate court's holding below, which grants trial courts broad discretion to rely on *ex parte* communications, is in-

consistent with these cases and with this Court's repeated admonition that a defendant has a right to be present whenever there is a "relation, reasonably substantial," to the defendant's ability to defend itself. *Gagnon*, 470 U.S. at 526 (quoting *Snyder*, 291 U.S. at 105).

To be sure, in *Rushen* and *Gagnon*, this Court held that the specific *ex parte* contacts between judge and jury in those cases were "innocuous" or "minor" occurrences, and therefore did not violate due process or amount to more than harmless error. Plainly, however, the same cannot be said here: The trial judge explicitly relied on *ex parte* communications to grant plaintiff a new trial. App., *infra*, 34a. Indeed, unlike in *Gagnon*, the YMCA's counsel had no opportunity to identify or question the allegedly affected jurors, who had long since been dismissed. Rather, the YMCA was denied any right to be present and cross-examine the jurors at a meaningful time when it could have protected its interests and evaluated the extent of any prejudice. In such circumstances, the trial judge's reliance on *ex parte* hearsay communications from the jury conflicts with this Court's guarantee of a "fair and just hearing." *Snyder*, 291 U.S. at 108.

* * *

In his dissent in *Gagnon*, Justice Brennan noted that the Court had not articulated a precise standard for determining when *ex parte* communications between a judge and jury violate due process: "No guiding standard for future application is provided; the Court simply invokes its power to decide *this* case. Such ad hoc resolutions invariably engender more problems than solutions for lower courts." 470 U.S. at 531 (Brennan, J., dissenting) (emphasis in original). Although the Court in *Gagnon* found no constitutional error on the peculiar facts of that

case—because the factfinder was likely not influenced by the *ex parte* communications—it did not establish a rule that actual, demonstrated reliance on *ex parte* communications is favored or even permissible. On the contrary, the great weight of this Court's precedents reflects the view that reliance on *ex parte* communications is highly disfavored.

Because the Illinois appellate court's approach, contrary to this Court's decisions, would actually favor and encourage judicial reliance on *ex parte* communications, certiorari is warranted for that reason alone. But this case also provides an ideal vehicle for the Court to resolve the issue of law left open by *Gagnon* and identified by Justice Brennan: the precise circumstances in which *ex parte* communications between a judge and juror violate due process.

This Court's cases clearly point toward a bright-line rule to govern such cases: Whenever a court relies on *ex parte* communications to reach a decision that affects substantial rights, it violates due process. *E.g.*, *Hopt*, 110 U.S. at 579 (presence required "at every stage of the trial when . . . *substantial rights may be affected*"); *Snyder*, 291 U.S. at 107-08 ("the presence of a defendant is a condition of due process to the extent that *a fair and just hearing would be thwarted* by his absence"); *Stincer*, 482 U.S. at 745 (1987) (presence "guaranteed . . . at any stage of the . . . proceeding that is *critical to its outcome*") (emphases added). This Court's review is warranted to clarify that, in keeping with the principles enunciated in this Court's precedents, the Due Process Clause forbids judicial reliance on *ex parte* communications to alter the outcome of a trial or otherwise affect a litigant's substantial rights.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM STATE COURTS OF LAST RESORT

The decision below also conflicts with decisions from several state supreme courts holding that a judge may not rely on *ex parte* communications to affect the outcome of litigation. As noted above, Justice Brennan predicted in his *Gagnon* dissent that the majority's failure to articulate a clear rule to identify when reliance on *ex parte* communications violates due process would "invariably engender more problems than solutions for lower courts." 470 U.S. at 531. Those concerns have indeed come to pass: The appellate court's decision here conflicts with several state supreme court decisions holding that due process prohibits reliance on *ex parte* communications to affect substantial rights. Certiorari is warranted to resolve the conflict between the decision below and these appellate precedents.

In *Yost v. Johnson*, 591 A.2d 178 (Del. 1991), the Supreme Court of Delaware held that a Delaware family court judge violated due process by relying on an *ex parte* conversation to rule on a motion to dismiss in a custody dispute. In *Yost*, the child's mother argued that the family court lacked jurisdiction, and the judge denied the motion based on facts developed in an *ex parte* conversation with a Virginia judge. *See id.* at 180-81. There was no written record of the *ex parte* conversation and no written decision recording the key jurisdictional fact, namely, whether the Virginia judge had earlier deferred the same custody dispute. *See id.* at 181.

The Supreme Court of Delaware held that "the trial court's *ex parte* communication with the Virginia judge resulted in a serious violation of [the mother's] constitutional right to procedural due process." *Id.* at 181. The trial court failed to notify the

parties of its contact with the Virginia judge, and there was "no evidence that the Family Court kept a written record of the conversation." *Id.* at 182. Therefore, the trial court had violated its "fundamental duty to notify the parties of the intended communication in advance, and to permit them to meaningfully participate in the discussion." *Id.* "Anything less," the court concluded, "does not comport with basic principles of due process." *Id.*

Similarly, in *Ex parte R.D.N.*, 918 So. 2d 100 (Ala. 2005), another custody dispute, the Supreme Court of Alabama held that a trial court violated due process by predicating a custody ruling on an *ex parte* recommendation from the child's guardian at litem. The recommendation "was not presented as evidence produced in open court and was based on information that may or may not have been properly presented to the court." *Id.* at 104. Therefore, the Court concluded that "the trial court's ex parte communications with the guardian ad litem and its reliance upon her recommendation . . . violated the fundamental right of the father to procedural due process." *Id.* at 105.

The Mississippi Supreme Court reached a similar conclusion in *Whitney National Bank v. Smith*, 613 So. 2d 312 (Miss. 1993) (*en banc*), which held that a lower-court judge violated due process by amending a judgment from dismissal "without prejudice" to "with prejudice" following an *ex parte* request from one party—without notice to the opposing party that would be prejudiced by the order. The court held that "the procedure utilized egregiously offends all notions of due process and acceptable conduct." *Id.* at 313.

The decision below squarely conflicts with the decisions in *Yost*, *Ex parte R.D.N.*, and *Whitney*. Each of those state appellate courts concluded, with-

out hesitation and as a matter of law, that it violates due process for a court to rely on *ex parte* communications to determine the outcome of a case or otherwise affect a party's substantial rights. By stark contrast, the Illinois appellate court below concluded that it was within the trial court's discretion—subject only to clear refutation by the record—to rely on *ex parte* communications as a basis for granting plaintiff a new trial. That holding is irreconcilable with decisions of the Delaware, Alabama, and Mississippi appellate courts. Therefore, this Court should grant certiorari to resolve the conflict among the state courts.

III. THE DUE PROCESS ISSUE THAT HAS DIVIDED THE LOWER COURTS IS RECURRING AND EXCEPTIONALLY IMPORTANT

The due process issue raised in this petition—one that has recurred throughout this Court's history—has profound implications for the fair administration of justice in the United States. It is a central tenet of our adversary system, and a foundation for the public's trust in the courts, that judges should not render decisions based on secret evidence (including *ex parte* communications) presented off the record and outside the presence of an adversely affected party. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts."). The appellate court's ruling, however, effectively immunizes trial judges who rely on *ex parte* evidence to decide cases, except in circumstances where their factual findings are belied by the record. Such patent disregard for basic due process principles requires this Court's intervention, as the Nation's final arbiter of the constitu-

tional standards governing the administration of justice. *See, e.g.*, *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009) (noting that "this Court's intervention and formulation of objective standards" is particularly appropriate in cases raising clear due process violations).

Besides being unconstitutional and fundamentally unfair to the affected party, basing a decision on *ex parte* contacts between judges and jurors is also fraught with potential to lead to erroneous results. As this Court has observed, "[a]ny *ex parte* meeting or communication between the judge and . . . a deliberating jury is pregnant with possibilities for error. . . . [E]ven an experienced trial judge cannot be certain to avoid all the pitfalls inherent in such an enterprise." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 460 (1978). In some cases, a judge's *ex parte* contact with a jury will improperly influence the verdict, as jurors are liable to misinterpret offhand statements made by a judge as binding instructions. *See id.* at 460-61. In other cases, as here, a judge may extrapolate isolated comments allegedly made by jurors into a finding that the jury was prejudiced, requiring a new trial. In either case, because the communication was not subjected to the scrutiny of open proceedings and the adversary system, the likelihood of error is enhanced. *See, e.g.*, *Greene*, 360 U.S. at 497-98 ("probing questions" asked of an absent witness will "often uncover inconsistencies, lapses of recollection, and bias"). Indeed, that danger was multiplied exponentially in this case, because the *ex parte* conversations contained double hearsay; *i.e.*, alleged communications from the jurors to the deputy sheriff to the judge. Absent review by this Court, factfinders like the trial judge below will continue to rely on *ex parte* evidence, impairing the quality of decision-making and violating the rights of litigants like the YMCA.

Further, without additional guidance from this Court, lower courts will continue to divide on whether—and in what circumstances—due process allows a factfinder to rely on *ex parte* communications to render a decision. Properly understood, the Due Process Clause forbids reliance on *ex parte* communications to affect substantial rights. This Court should grant review to provide a clear, uniform rule for the lower courts on this important constitutional issue and protect the rights of parties like the YMCA to a fair and open trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EDWARD M. KAY
PAUL V. ESPOSITO
CLAUSEN MILLER P.C.
10 South La Salle Street
Chicago, IL 60603
(312) 855-1010

THOMAS G. HUNGAR
Counsel of Record
MIGUEL A. ESTRADA
THOMAS M. JOHNSON, JR.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

October 2, 2009

APPENDIX A

Appellate Court of Illinois,
First District, Second Division.
U.S. BANK, as Trustee of the Roe Ann Lockhart Obra '93 Trust, and the Roe Ann Lockhart of Obra '93 Trust, formerly U.S. Bank, as Guardian and Representative of the Estate of Roe Ann Lockhart, a disabled minor, Plaintiff-Appellee,

v.

YMCA OF METROPOLITAN CHICAGO, a Corporation, Defendant-Appellant
(Terrell C. Sanderson, as a Duly Authorized Agent, Servant and Employee of the YMCA of Metropolitan Chicago, a Corporation, Defendant).
No. 1-07-0487.

Dec. 31, 2008.

Clausen Miller, P.C., Chicago (Edward M. Kay, Agelo L. Reppas, Paul V. Esposito and Paula M. Carstensen, of Counsel), for Appellant.

Clifford Law Offices, P.C., Chicago (Robert Sheridan, of Counsel); Curcio Law Offices, Chicago (Joseph R. Curcio, of Counsel); and Novoselsky Law Offices, Chicago (David A. Novoselsky and Leslie J. Rosen, of Counsel), for Appellee.

Justice CUNNINGHAM delivered the opinion of the court:

This is an appeal from a judgment for the plaintiff, U.S. Bank, of $15,468,277 entered on a jury ver-

dict rendered in the circuit court of Cook County on October 12, 2006, after a reduction for comparative negligence and setoff for prior payments. U.S. Bank is the trustee of the Roe Ann Lockhart Obra '93 Trust and the guardian and representative of the estate of Roe Ann Lockhart, a disabled minor. Roe Ann was a 12-year-old pedestrian when she was injured on January 8, 2001, in Harvey, Illinois, by a minivan owned by the defendant YMCA of Metropolitan Chicago, a corporation (YMCA), and driven by defendant Terrell C. Sanderson, YMCA's employee (Sanderson).[1] A first jury trial resulted in a verdict for YMCA and Sanderson, but the trial court granted U.S. Bank's request for a new trial. The trial court found that repeated, deliberate outbursts by trial counsel for the defendants were heard by the jury and prejudiced U.S. Bank, denying them a fair trial. After the trial court granted U.S. Bank a new trial, the motion of YMCA and Sanderson for leave to appeal was denied by this court and a petition for leave to appeal to the Illinois Supreme Court was also denied. Accordingly, the second jury trial proceeded to completion, with the verdict noted above.

On appeal, YMCA contends that the trial judge in the first trial abused his discretion by granting U.S. Bank a new trial where there was no on-the-record evidence that the jury heard any of the prejudicial comments by defense counsel. YMCA claims that because the comments were made outside of the

---

[1] Prior to jury selection in the second trial, U.S. Bank voluntarily dismissed the driver, defendant Sanderson. Accordingly he was not a defendant in the second trial and he is not a party to this appeal.

immediate presence of the jury, they could not have been overheard and therefore were not prejudicial. Alternatively, YMCA seeks a third trial based on what it characterizes as prejudice arising from what it alleges were trial court errors in the second trial. Those alleged errors were: (1) giving a non-IPI jury instruction concerning Sanderson's duty of care where a minor was involved; (2) barring portions of the testimony of YMCA's accident reconstruction expert; and (3) refusing to give the jury IPI 501, missing-witness instruction when U.S. Bank did not call its previously retained accident reconstruction expert to testify on its behalf in the second trial. Finally, YMCA challenges the damages awarded by the jury. We affirm.

BACKGROUND

Two different trial judges are involved in this appeal because the trial judge who presided over the first trial did not preside over the second trial when the case was retried. The entire common law record and transcript of the first trial have been included in the record on appeal before this court. But because most issues relate primarily to the second trial, we need not summarize the evidence adduced in the first trial. The only issue with respect to the first trial is whether the trial court abused its discretion in granting U.S. Bank's motion for a new trial. In its motion for a new trial following the verdict in the first trial, U.S. Bank asserted that one of defendants' attorneys in the first trial had made unfounded accusations that he was the victim of wrongdoing and unfair treatment by U.S. Bank's counsel and by the trial court. According to U.S. Bank, these comments were repeatedly made during sidebar conferences outside the presence of the jury in the court hallway

in such a loud voice that the trial court had to admonish defense counsel on more than one occasion to lower his voice because, the trial judge pointed out, the jury could hear defense counsel's outbursts.

At the completion of the first trial, U.S. Bank filed its motion for a new trial soon after the jury's verdict in favor of the defendants. After the verdict but before ruling on U.S. Bank's motion, the trial court entered an order referring the parties to mediation. Pending the outcome of mediation, the trial court took U.S. Bank's motion for a new trial under advisement, without indicating how it would ultimately rule. The mediation effort failed, and about six months after the jury's verdict in the first trial and the filing of U.S. Bank's motion for a new trial, the trial court ruled in favor of U.S. Bank, granting it a new trial. In ruling on U.S. Bank's motion for a new trial, the trial court noted that it had been confronted with the egos of attorneys accompanied by a "grandiose display of arrogance to the judicial system." The trial court concluded that the behavior of defense counsel who was from out of state and admitted *pro hac vice* for this case, had interfered with the rights of the parties and denied U.S. Bank a fair trial. Because of this behavior, the trial court stated, it had no alternative but to correct those wrongs committed by an officer of the court. The trial court noted that although the trial transcript was "replete" with continued prejudicial comments and actions by defense counsel, the record could not accurately reflect what the court had personally observed in reaching its conclusion regarding the behavior of defense counsel. The trial court made findings that it repeatedly had to move the proceedings from the courtroom to sidebar conferences held outside the jury's presence because of the behavior of defense

counsel. In making its finding, the court commented that on several occasions, because the deputy sheriff did not react quickly enough, the court itself had to "scramble" to close the courtroom door in an effort to prevent the jury from overhearing continual comments by defense counsel which the trial court found inappropriate. Even with the door closed, the trial court was required to repeatedly order defense counsel to keep his voice down. In its ruling on YMCA's motion, the trial court found that these admonitions to defense counsel were to no avail. Despite the efforts of the trial court and the deputy sheriff, it was the trial court's finding that the jurors heard the loud outbursts by defense counsel. The trial court also noted that the deputy sheriff had informed the court that the jury had told the deputy sheriff that they were "in disbelief" after hearing these "outbursts" by defense counsel. The deputy sheriff's report to the trial court was not recorded in the trial record.

The trial court made a specific factual finding that the outbursts by defense counsel were not accidental but were "purposefully made for the jury to hear." The trial court added that defense counsel had been repeatedly admonished but counsel had "ignored the Court in an effort to divert justice." The trial court also noted that defense counsel repeatedly came into the court's chambers at the end of a day's trial session and apologized to the trial court for his behavior, thus demonstrating that defense counsel knew that his behavior was wrong. The trial court further noted that another defense attorney had also been admonished only once and never had to be admonished again during the trial. The trial court summarized its ruling and reasoning, in noting that the persistent outbursts and bad behavior of the de-

fense attorney would not be tolerated. The court added, "This Court will not tolerate the conduct of an attorney who disrespects our sacred judicial and jury system." It then granted U.S. Bank a new trial. As mentioned above, appeals to the Illinois Appellate and Supreme Courts were denied following the granting of YMCA's motion for a new trial. The case eventually proceeded to a second trial before a different trial judge. Additionally, in the second trial, U.S. Bank was represented by different trial counsel.

YMCA does not seek a judgment notwithstanding the verdict in the second trial. Rather, it contends that a series of trial errors denied it a fair trial in the second trial and thus it seeks a third trial. Alternatively, YMCA challenges the amount of the damages award.

At the second trial, the evidence established that on January 8, 2001, at about 3:30 or 3:45 p.m., 12-year-old Roe Ann Lockhart began to cross Dixie Highway near its intersection with 150th Street in Harvey, Illinois. She was struck and severely injured by a YMCA van driven by YMCA employee Terrell Sanderson.

Two eyewitnesses testified at trial. The first eyewitness, Willie Ann Hagler, testified that she was stopped at a red light facing in a northerly direction on Dixie Highway where it intersected with 150th Street. It appeared to Hagler that Roe Ann could not cross at the crosswalk because her path was blocked by a mound of snow. Roe Ann stepped into the street twice and twice returned to the sidewalk. The third time she stepped into the street, she was hit by the van, which was traveling in a northerly direction on Dixie Highway, which Hagler first saw virtually at the point of impact. The second eyewitness, Tami

Tenish Bolden Blocker, was also stopped at a red light on Dixie Highway where it intersected with 150th Street. She also saw Roe Ann twice step into the roadway and then step back. Roe Ann then looked both ways on Dixie Highway and "dashed out" into the street at a time when the light for the traffic traveling north and south on Dixie Highway was still red. Blocker testified that she did not see the van until it turned the corner from 150th Street onto Dixie Highway and struck Roe Ann.

Terrell Sanderson admitted that he was driving the van which struck Roe Ann, but denied that he turned the corner from 150th Street onto Dixie Highway just before the accident. He testified that he was driving north on Dixie Highway, in the curb lane, approaching the intersection with 150th Street. The light for traffic on Dixie Highway was red, so he slowed to almost a complete stop, perhaps five miles an hour or a little less. But then the light turned green as he was still approaching the intersection. Sanderson's testimony was conflicting in that he also testified that he then proceeded through the intersection at a "very minimal speed," under 20 miles per hour. But he also admitted not being able to recall whether he speeded up. He admitted that as he approached the intersection he saw children wearing school uniforms in a nearby gas station and on 150th Street, but he stated that he did not see anyone at the intersection, nor did he see anyone waiting to cross in the area where the evidence established Roe Ann was preparing to cross Dixie Highway. Sanderson initially testified that he recalled someone "darting out in front" of his van and being struck by it. But on cross-examination he admitted that he did not see the person until the impact, so he did not actually know if Roe Ann was running or walking into

the street. He testified that he stopped and tried to attend to Roe Ann, who was lying motionless in the street. He also summoned emergency help.

YMCA presented the testimony of Michael O'Hern, an expert on accident reconstruction. He testified to certain aspects regarding the accident, including the following. He listed the feet per second (fps) a car would be traveling at various speeds: 22 fps at 15 miles per hour, 29.4 fps at 20 miles per hour, and 36.65 fps at 25 miles per hour. Although varying per individual, the minimum time it would take a driver to move after a light turned green would be one second. It would take a driver 1 1/2 seconds to react when someone ran into the roadway in front of the driver. That reaction time would be cut in half, to three quarters of a second if the driver saw the person beforehand and recognized that the person might cross the street. It was O'Hern's opinion that Roe Ann was running at a slow rate of speed at the time of the collision. It took her between .72 and .78 seconds to move from a distance on the sidewalk of three feet from the curb to the middle of the traffic lane, where she was struck by the van. If she started from the curb, it would take her one-half second to reach the point of impact in the middle of the traffic lane. On the other hand, if she only traveled four feet into the traffic lane, it would take her one-third of a second to arrive there starting from the curb, and nine-tenths of a second from three feet inside the sidewalk. U.S. Bank's objections were sustained by the trial court and O'Hern was not permitted to provide additional testimony that he did not believe that Sanderson had turned right from 150th Street just before the accident, as eyewitness Blocker had testified. O'Hern was also barred from testifying that had Sanderson turned right from 150th Street,

the accident could not have occurred. He was also not permitted to testify that Sanderson had only one-third to one-fourth of a second to react, which was an insufficient period of time in which to brake or take other evasive action, and therefore the accident was "unavoidable." This barred testimony was presented to the trial court as an offer of proof.

There was a great deal of evidence concerning Roe Ann's injuries. She sustained a traumatic brain injury, injury to the seventh cranial nerve, a fractured leg, and injury to ligaments in her left knee. The totality of her injuries left her permanently wheelchair dependent. There was testimony that she will never be able to live independently. A clinical psychologist, Dr. Roger Stefani, who had examined Roe Ann and her school records, was not available to testify at trial. By agreement of the parties, his testimony was presented in the form of his prior evidence deposition. He opined that Roe Ann had suffered permanent brain injury from the accident. Even three years afterward she displayed very significant deficits. Before the accident, when Roe Ann was in fourth grade, she was an A and B student and was reading at a fifth-grade level, although her math skills were about six months behind what was expected. In the fifth grade, still before the accident, she had become a B and C student and had received a grade of D in math. But when Dr. Stefani examined Roe Ann in February 2004, three years after the accident, her reading comprehension was only in the eighth percentile for her grade level. Her ability to retrieve words was below the second percentile for her grade level, and her nonverbal intelligence was below the first percentile for her grade level. Dr. Stefani opined it was highly unlikely she would ever achieve anything near a full recovery of her abilities.

Dr. Stefani also stated that the type of brain injury Roe Ann experienced, a shearing of the brain, often produces the kind of global deficits which she continues to experience.

Dr. Stefani also observed that Roe Ann had developed severe permanent deficits in the use of both hands. Her voice and speech patterns were permanently affected. It was Dr. Stefani's opinion that Roe Ann could not be safely left unattended for more than one hour at a time. He recommended that she continue to receive physical and occupational therapy, speech and language therapy, and counseling services.

Another expert testifying for U.S. Bank was Dr. Gary Yarkony, who is board certified in physical and rehabilitation medicine and is a provider of lifelong care to disabled people. His examination of Roe Ann revealed that she suffered from cognitive dysfunction, lack of coordination, spasticity in her legs, and difficulty moving her fingers and coordinating her legs, which would move spontaneously. She was impulsive to the extent that she was a danger to herself because she could not control her impulses, actions and emotions, nor could she consider the consequences of her actions. Dr. Yarkony opined that Roe Ann requires medication for her spasticity and permanently requires diapers and bed pads. She would require 12 hours of in-home nursing care each day until she completed high school and then would require 24-hour-a-day nursing care. She would also require a wheelchair-accessible-home and van.

Economist, Dr. Larry DeBrock, testified for U.S. Bank and opined that the current cash value of Roe Ann's future medical and related care, based on a normal life expectancy, was approximately $9 mil-

lion. The current cash value of her lost earnings was $1,113,600 if she only completed high school, and $1,981,685 if she graduated from college.

YMCA's medical expert was Dr. Ken Viste, board certified in neurology and neurorehabilitation. His specialty is neurologic rehabilitation, which assists people in regaining as much function as possible after experiencing strokes, head or spinal cord injuries, and after diseases affecting the nervous system. Dr. Viste opined that Roe Ann only required three to four hours of assistance in the morning and the same in the evening each day. He disagreed that Roe Ann would require 24-hour-per-day in-home nursing care after leaving high school. If she could not live with her family, he opined that the cost of a group home or assisted living facility would range from $1,800 to $2,800 per month. He also did not believe that she needed ongoing physical therapy.

Based upon this testimony, YMCA presented the cost estimates of Thomas Daniel Walsh, an economic consultant. Walsh estimated that Roe Ann's future lost earnings would be $709,000 if she graduated from high school and $855,000 if she graduated from college. He opined that the current cash value of her future medical care was $1.1 million. At the close of all of the evidence, the parties proffered jury instructions, which included IPI pattern and non-IPI instructions. After closing arguments the trial court instructed the jury.

The jury awarded Roe Ann damages of $250,000 for disfigurement, $1 million for pain and suffering that she had already experienced, $2.5 million for future pain and suffering, $750,000 for current disability, $7 million for future disability, $354,497.06 for medical care that she had already received,

$9,180,661 for future medical care, and $1,548,095 for the current cash value of lost future earnings. The jury award totaled $22,583,253.06, but that was reduced to a rounded-off amount of $15,468,277 after the jury found Roe Ann to be 30% comparatively negligent and after the trial court deducted $340,000 for out-of-court settlements received from CITGO and the Village of Harvey. This timely appeal followed the second trial.

ANALYSIS

We first consider YMCA's claim that the trial judge in the first trial erred when he granted U.S. Bank a new trial after the jury found in favor of YMCA and Sanderson. The trial court's ruling on a motion for a new trial is reviewed under an abuse of discretion standard. *Ruffin ex rel. Sanders v. Boler*, 384 Ill.App.3d 7, 17, 322 Ill.Dec. 255, 890 N.E.2d 1174, 1183 (2008). This deferential standard is applied because it is the trial court which is in the unique position of being able to observe the witnesses and how they testified, as well as all the other circumstances relating to their credibility. *Ruffin*, 384 Ill.App.3d at 17, 322 Ill.Dec. 255, 890 N.E.2d at 1183. The trial judge, in his findings rendered when ruling on U.S. Bank's motion for a new trial, explained that the deputy sheriff assigned to his courtroom, whom the judge described as "one of the best in the building," had reported to the judge the jurors' consternation ("in disbelief") upon hearing loud comments made by defense counsel during the first trial. YMCA contends that these comments were made out of the hearing range of the jury. In support of its argument, YMCA relies heavily upon the holding in *Hartgraves v. Don Cartage Co.*, 63 Ill.2d 425, 348 N.E.2d 457 (1976). In that case the trial court

announced during trial that one of the jurors had been injured and could not serve. The court held an off-the-record conference with the attorneys. Back on the record, the court announced, over defense counsel's objection and request for a mistrial, that the trial would proceed with 11 jurors. When the trial concluded, the jury reached a verdict for the plaintiff. In an affidavit opposing the defendant's motion for a new trial, the plaintiff's attorney stated that during the off-the-record in-chambers discussion, defense counsel told the court that he would formally object to proceeding with 11 jurors. But according to the affidavit, defense counsel then also told the court he wanted his objection to be overruled, because he was actually willing to proceed with 11 jurors. Defense counsel denied this account in his own affidavit in response to the motion for a new trial. Six months after trial, the trial court stated that it recalled that defense counsel had proposed a sham objection which the trial court would overrule. Accordingly, the trial court denied the motion for a new trial. On appeal the case was reversed and remanded for a new trial. In affirming that decision, the Illinois Supreme Court held:

> "[A]ny corrections of or additions to the record which contradict the clear and unambiguous contents of the record must be supported by something other than the 'clear memory' of the trial judge." *Hartgraves*, 63 Ill.2d at 432, 348 N.E.2d at 461.

The Supreme Court noted that the record established that defense counsel had demanded a 12-person jury and nothing on the record contradicted that fact. Plaintiff's counsel had argued against the motion for a mistrial, but did not assert that defense counsel

had stipulated to an 11-person jury. In fact, during argument on defense counsel's motion for a mistrial, counsel for the plaintiff and the defendant told the court, in answer to the court's direct question, that there had been no such stipulation. Accordingly, the Supreme Court found that it was reversible error for the trial judge to deny the motion for a mistrial. *Hartgraves*, 63 Ill.2d at 432, 348 N.E.2d at 461.

We do not find *Hartgraves* to be applicable to the case before us. In the case of *In re Estate of Gay*, 353 Ill.App.3d 341, 288 Ill.Dec. 925, 818 N.E.2d 860 (2004), this court found that *Hartgraves* was limited to instances where the trial court's recollection was directly contradicted by the record, so that if there was no such contradiction, the trial court would be permitted to rely upon its recollections. *Gay*, 353 Ill.App.3d at 344, 288 Ill.Dec. 925, 818 N.E.2d at 863; relying on *Paschen Contractors, Inc. v. Illinois State Toll Highway Authority*, 225 Ill.App.3d 930, 935-36, 168 Ill.Dec. 902, 590 N.E.2d 539, 542-43 (1992). Nothing in the record before us impeaches or contradicts the trial court's recollection and therefore it was not error for the court to rely upon his recollection.

Although YMCA complains that the trial court launched no formal inquiry after being told by the deputy sheriff of the jurors' comments, YMCA points to no support for its argument that a formal inquiry by the trial court was required. The observation described by the trial court was relayed to him by a law enforcement officer, the deputy sheriff, assigned to the judge's courtroom. The trial judge was obviously present when defense counsel repeatedly engaged in what the court described as bad behavior which was disrespectful to our system of justice. The trial court

specifically described that behavior as loud comments, which were purposefully made within the hearing range of the jury. The trial court found the behavior to be prejudicial to U.S. Bank. The trial court on several occasions resorted to quickly closing the courtroom door in an attempt to shield the jurors from hearing defense counsel's comments. Most importantly, based upon his own observations in conducting the trial, the trial judge made factual findings that defense counsel made these comments with the *deliberate intent* that the jury hear them, in an effort to "divert justice." The trial court also found that defense counsel knew his conduct was improper. The court cited to numerous instances when defense counsel apologized to the judge in chambers at the close of a day of bad behavior by defense counsel. The trial court also noted the ability of another defense attorney to temper his behavior after being admonished by the court just once.

As we have noted, the trial court's findings and opinions regarding defense counsel's behavior and the need for a new trial were communicated to the attorneys following the jury's verdict in the first trial. However, during that trial there were many occasions when the trial judge admonished defense counsel and asked him to lower his voice. After the verdict, the court entered an order referring the parties to mediation in an effort to settle the case while taking U.S. Bank's motion for a new trial under advisement. The trial court's findings concerning defense counsel's behavior and remarks during the trial were revealed to the parties six months after the verdict in the first trial, when the court announced its ruling on U.S. Bank's motion for a new trial. It can reasonably be inferred that the trial court may have determined that the issue would be

moot if the parties settled the lawsuit through the mediation process. It is unfortunate that the trial court did not inform the attorneys when his deputy sheriff informed him of the jurors' comments. However, that failure does not affect the trial court's decision making process in granting U.S. Bank a new trial. The trial court's findings were accompanied by comments regarding his own observations. When mediation was unsuccessful and the parties were informed of the trial court's findings and ruling, it is noteworthy that YMCA and Sanderson made no effort to refute the trial court's findings regarding defense counsel's behavior during the trial. Notwithstanding the passage of six months, at a minimum, counsel for YMCA and Sanderson could have taken issue with the judge's findings and made a record regarding those points that they believed refuted the trial judge's opinion and ruling. Their failure to make any effort to provide a record contradicting the trial court's findings considerably weakens their claim of abuse of discretion by the trial court.

The standard of review that we must apply to overturn the trial court's ruling based on the abuse of discretion alleged by YMCA requires us to conclude that no reasonable person would have made the same decision as the trial court in this case. *Somers v. Quinn*, 373 Ill.App.3d 87, 95-96, 310 Ill.Dec. 848, 867 N.E.2d 539, 547 (2007). The trial court concluded that the repeated loud comments made by defense counsel, in spite of repeated admonishments by the court, were intended to be heard by the jury, for the purpose of creating prejudice, and were in fact heard by the jury and did in fact prejudice U.S. Bank, depriving it of a fair trial. This recollection was not contradicted by the record and so the trial court properly relied upon it. *Gay*, 353 Ill.App.3d at

344, 288 Ill.Dec. 925, 818 N.E.2d at 863. Under these facts, we cannot say that no reasonable trial court would ever have come to the same conclusion. *Ruffin*, 384 Ill.App.3d at 17, 322 Ill.Dec. 255, 890 N.E.2d at 1183. Accordingly, we find no abuse of discretion by the trial court and thus no error in the granting of U.S. Bank's motion for a new trial following the completion of the first trial.

Our remaining analysis concerns YMCA's allegations of error in the second trial, that it contends unfairly resulted in a verdict for U.S. Bank.

YMCA contends that in the second trial the new trial judge who presided over that trial erred by giving the jury a nonpattern instruction regarding a defendant's duty of ordinary care where a minor was involved. In addition to the *Illinois Pattern Jury Instructions, Civil Nos. 10.02* and *10.04* (3d ed. 1995) (hereinafter IPI Civil 3d) regarding a defendant's duty of ordinary care, the trial court added an additional non-IPI instruction. *IPI Civil 3d, Nos. 10.02* and *10.04* contain the following language, respectively:

> "When I use the words 'ordinary care,' I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for your to decide."
>
> "It was the duty of the YMCA of Metropolitan Chicago, before and at the time of the occurrence, to use ordinary care for the safety of Roe Ann Lockhart, a minor. That means it was the duty of the YMCA of Metropolitan Chicago to be free from negligence."

The court also gave, over YMCA's objections, the following instruction on the duty of care. The non-IPI instruction contained the following language:

> "Where children may reasonably expect [*sic*] to be in a vicinity, a motorist, although still held to a standard of ordinary care, must exercise greater care for the safety of those children than he would for adults."

YMCA contends that the non-IPI instruction misled the jury and prejudiced YMCA.

During oral argument on this appeal, YMCA acknowledged that a non-IPI instruction may be given on certain occasions, including where the IPI instruction does not accurately state the law. *Manus v. Trans States Airlines, Inc.*, 359 Ill.App.3d 665, 668, 296 Ill.Dec. 215, 835 N.E.2d 70, 73 (2005). YMCA also argues, and we agree, that the two IPI instructions given by the trial court sufficiently stated the law. While recognizing that *IPI Civil 3d, Nos. 10.02* and *10.04* accurately state the law under the facts of this case, YMCA nevertheless asserts that the giving of the additional non-IPI instruction negated the accuracy of the IPI instructions.

Here, the trial court's supplemental non-IPI instruction draws some support from *Toney v. Mazariegos*, 166 Ill.App.3d 399, 403, 116 Ill.Dec. 820, 519 N.E.2d 1035, 1037-38 (1988). There a police officer's vehicle struck a child who had wandered into the street from behind an ice cream truck. The appellate court found no error in the trial court's finding that the officer was negligent, and noted that where children were in the vicinity, a motorist, although still held to the standard of ordinary care, was required to exercise "greater care" for the safety of the children than he would have to exercise for

adults in the vicinity. *Toney*, 166 Ill.App.3d at 403, 116 Ill.Dec. 820, 519 N.E.2d at 1038; *see Cooper v. Miller*, 67 Ill.App.3d 349, 352-53, 24 Ill.Dec. 52, 384 N.E.2d 919, 921 (1978) (it is for the jury to decide whether a person driving when children are in the vicinity has exercised due care). YMCA is mistaken when it asserts that *Cates v. Kinnard*, 255 Ill.App.3d 952, 193 Ill.Dec. 460, 626 N.E.2d 770 (1994), forbids use of jury instructions utilizing the *Toney* holding. The *Cates* court merely held that under the particular facts of that case, the IPI instructions on the standard of ordinary care were sufficient and the court acted properly in not giving a *Toney*-based instruction. *Cates*, 255 Ill.App.3d at 958, 193 Ill.Dec. 460, 626 N.E.2d at 774. In the case before us, Sanderson admitted that he saw children in the area as he approached the intersection, so under *Toney* his exercise of ordinary care had to include the degree of caution necessary when children were present. This does not translate to requiring a higher duty of care as argued by YMCA.

Nonetheless, YMCA correctly argues that the caution required by the presence of children in the vicinity could and should simply have been part of the final argument of U.S. Bank. Under that scenario, the presence of children in the vicinity would be highlighted to the jury as a factor in evaluating the reasonable foreseeability of harm under the facts of this case. *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill.2d 110, 116-117, 214 Ill.Dec. 156, 660 N.E.2d 863, 868 (1995). We specifically caution trial courts that the use of IPI instructions is mandatory unless those instructions are inadequate to properly state the law. *LaSalle Bank, N.A. v. C/HCA Development Corp.*, 384 Ill.App.3d 806, 813, 323 Ill.Dec. 475, 893 N.E.2d 949,

957-58 (2008), citing *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill.2d 260, 273, 266 Ill.Dec. 892, 775 N.E.2d 964, 972 (2002). In the present case, the non-IPI instruction was superfluous and should not have been given. However, unless the instruction clearly misled the jury and prejudiced the other party, a reviewing court will not reverse on this ground. *Schultz*, 201 Ill.2d at 274, 266 Ill.Dec. 892, 775 N.E.2d at 973, *LaSalle Bank*, 384 Ill.App.3d at 814, 323 Ill.Dec. 475, 893 N.E.2d at 958. Here the jury received the proper IPI instructions on the applicable standard to be applied to determine negligence. But as both parties agreed during oral argument, it was also permissible for the jury to take into consideration that children were present near the site of the accident in evaluating foreseeability. To determine whether an abuse of discretion has occurred, the reviewing court must determine "whether, taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *Schultz*, 201 Ill.2d at 273-74, 266 Ill.Dec. 892, 775 N.E.2d at 973. Thus, we find no prejudice to YMCA and therefore no reversible error in the giving of the non-IPI instruction. It is also clear that the jury was not improperly swayed in favor of Roe Ann simply because she was a minor, given that the jury found Roe Ann to be 30% responsible for the accident.

YMCA also complains that its accident reconstruction expert was erroneously barred from testifying that the accident was unavoidable. YMCA asserts that its expert should have been allowed to testify that if, as U.S. Bank suggested, the van driver, Sanderson, had just made a right turn from 150th Street onto Dixie Highway, it would have been impossible for him to strike Roe Ann. Again we apply

the abuse of discretion standard. The trial court permitted the expert to testify as to his calculations regarding the time that Sanderson would have had to avoid the accident, based upon varying speeds and varying starting points on the sidewalk for Roe Ann. The jury was free to conclude from this testimony that Sanderson was free from negligence. But the additional testimony that YMCA sought to elicit from the expert would have supplanted the jurors' role as fact finders. YMCA wanted the jurors to hear its expert's unequivocal testimony that the accident was unavoidable and that one of U.S. Bank's theories, suggesting negligence by Sanderson in making a right turn, was impossible. The expert's calculations of feet per second arising from different speeds and a driver's resulting reaction time are obviously matters beyond the knowledge of ordinary jurors. But jurors are certainly capable of drawing reasonable inferences from scientific facts regarding the negligence or lack thereof arising from these calculations. That is what juries are supposed to do. For YMCA to have had its expert testify that under these facts there could be no negligence by U.S. Bank or Sanderson, would have invaded the jury's proper role and was correctly excluded. *Watkins v. Schmitt*, 172 Ill.2d 193, 205-207, 216 Ill.Dec. 822, 665 N.E.2d 1379, 1385-86 (1996). It is clear that YMCA's expert was permitted to testify to those scientific matters that were not within the knowledge of ordinary jurors.

The facts at issue here are clearly distinguishable from those of *Turner v. Williams*, 326 Ill.App.3d 541, 260 Ill.Dec. 804, 762 N.E.2d 70 (2001), cited by YMCA. In *Turner* there were multiple varying accounts of the speed of the two vehicles involved in an accident. The *Turner* court found that under those

circumstances, where the conflicting testimony as to vehicle speeds could have confused the jury, it was error not to permit an expert to testify as to his determination of the speeds of the vehicles based upon the application of computer programs. *Turner*, 326 Ill.App.3d at 545, 260 Ill.Dec. 804, 762 N.E.2d at 81. In the case before us, to quote from YMCA's opening brief, "It was undisputed that Sanderson was traveling between 15 and 25 miles per hour at the time of the accident, well below the posted speed limit of 40 miles per hour." Clearly in this case the lay testimony did not threaten to confuse the jurors on this point. YMCA's expert witness was permitted to testify to scientific observations not within the general knowledge of the jury, but he was barred from expressing his opinion on ultimate facts, which were rightfully for the jury to determine. This was clearly within the trial court's discretion. Accordingly, we hold that the trial court did not abuse its discretion and thus did not commit reversible error in barring the additional testimony of YMCA's expert.

YMCA also contends that the trial court erred in refusing to give the jury YMCA's requested missing-witness instruction since U.S. Bank chose not to present the testimony of the accident reconstruction expert whom it had called in the first trial. The missing-witness instruction is to be given only if the court determines that the witness would have been produced by the party if his testimony was favorable; the witness was available to the one party and not equally available to the opposing party; a reasonably prudent person would have produced the witness had they believed the witness would testify in their favor; and no other reasonable excuse for the decision not to produce the witness is shown. *Montgomery v.*

Blas, 359 Ill.App.3d 83, 86-87, 295 Ill.Dec. 725, 833 N.E.2d 931, 934 (2005).

YMCA's argument in favor of this instruction falls short of meeting a number of these criteria. Most notably, new trial counsel for U.S. Bank, just prior to opening arguments in the second trial, told the court that he had determined that his case could properly be brought without the use of expert testimony concerning how the accident occurred. After all, the van driver, Sanderson, had admitted that he did not see Roe Ann until he actually struck her, despite the fact that the accident occurred in broad daylight. Sanderson also testified that he saw two different groups of school children in the area as he approached the intersection where the accident occurred. Additionally, notwithstanding its contention on appeal that the trial court erred, YMCA never attempted to find or subpoena U.S. Bank's expert from the first trial in order to secure his testimony at the second trial. YMCA cannot now contend that the expert was not as available to it as he was to U.S. Bank. We cannot determine from the record before us whether the other criteria outlined above regarding the missing witness instruction are present here. We have only the proffered explanation by U.S. Bank's counsel for the second trial, as recounted above. So, we cannot say that the explanation given by U.S. Bank's counsel for declining to call the expert is unreasonable or untrue. Accordingly, we hold that the trial court did not err in refusing to give the missing-witness instruction requested by YMCA.

YMCA next contends that the damages awarded by the jury were grossly excessive and the product of passion and prejudice. We have summarized U.S. Bank's expert's testimony calculating damages of

approximately $10 million to $11 million solely for Roe Ann's future medical care and lost earnings. This amount did not include compensation for disfigurement, past, present, and future pain and suffering, past, present and future disability, and past and current medical expenses. Illinois case law clearly establishes that a jury's award is not to be a simple mathematical calculation. The jury may properly take into account such factors as the extent of the injuries, the expected duration of those injuries, the plaintiff's age, future deterioration, and the restrictions the plaintiff will have to endure because of the injuries. *Epping v. Commonwealth Edison Co.*, 315 Ill.App.3d 1069, 1072, 248 Ill.Dec. 625, 734 N.E.2d 916, 919 (2000). There was extensive testimony concerning the extent and severity of Roe Ann's mental and physical injuries, and additional factors that could properly be considered by the jury. Further, it is within the province of the jury to weigh the testimony of the various witnesses including experts and determine which testimony it will accept. In this case, although YMCA's experts presented significantly lower estimates regarding potential damages, the jury clearly rejected that testimony as is its right. Accordingly, we find no abuse of discretion in the jury award.

Finally, YMCA asserts that U.S. Bank's counsel in the second trial, brought the question of insurance into the case by telling the jurors during closing argument that it was not their concern where the money for payment of damages would come from. We find that this remark is isolated in the context of all of the evidence adduced in the entire second trial and closing arguments. YMCA also contends that certain remarks made by U.S. Bank's counsel encouraged the jury to overcompensate U.S. Bank for

any comparative negligence deductions. We note that none of these remarks now complained of by YMCA on appeal were contemporaneously objected to by YMCA's counsel in the trial court. Thus the trial court was given no opportunity to consider the propriety of the remarks or to correct any impropriety that may have occurred or to instruct the jury accordingly. Ordinarily the failure to object to allegedly improper final remarks will result in forfeiture of that objection as an issue on appeal. *Velarde v. Illinois Central R.R. Co.*, 354 Ill.App.3d 523, 543-44, 289 Ill.Dec. 529, 820 N.E.2d 37, 57 (2004). Even when a contemporaneous objection to the trial court properly presents an allegation of improper remarks, that determination is ordinarily left to the trial court's considerable discretion. *Lisowski v. MacNeal Memorial Hospital Ass'n*, 381 Ill.App.3d 275, 289, 319 Ill.Dec. 440, 885 N.E.2d 1120, 1135 (2008). We will not reverse on the grounds of improper remarks by counsel in final arguments unless those remarks were so egregious or prejudicial as to deny the defendant a fair trial. *Velarde*, 354 Ill.App.3d at 544, 289 Ill.Dec. 529, 820 N.E.2d at 57. We do not find that the remarks at issue here constitute the kind of error which would have denied YMCA a fair trial. Accordingly, we hold that there is no basis for reversal on that ground.

For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

Affirmed.

QUINN and ROBERT E. GORDON, JJ., concur.

APPENDIX B

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

U.S. BANK, as Trustee of the Roe Ann Lockhart Obra '93 Trust, and the Roe Ann Lockhart Obra '93 Trust, formerly U.S. Bank, as Guardian And Representative of the Estate of Roe Ann Lockhart, a disabled minor,	)	
Plaintiff-Appellee,	)	
v.	)	No. 1-07-0487
YMCA OF METROPOLITAN CHICAGO, a Corporation, Defendant-Appellant	)	
(Terrell C. Sanderson, as a Duly Authorized Agent, Servant and Employee of the YMCA of Metropolitan Chicago, a Corporation, Defendant).	)	

ORDER

Upon consideration of Defendants-Appellants' petition for rehearing:

IT IS HEREBY ORDERED that the petition for rehearing be and the same is hereby DENIED.

/s/
JUSTICE

/s/
JUSTICE

/s/
JUSTICE

ORDER ENTERED
FEB 19 2009
APPELLATE COURT, FIRST DISTRICT

APPENDIX C

U.S. Bank, etc., respondent, v. YMCA of Metropolitan Chicago, et al., petitioners.

No. 108246

SUPREME COURT OF ILLINOIS

232 Ill. 2d 597; 2009 Ill. LEXIS 576

May 28, 2009, Decided

OPINION

The following cases on the leave to appeal docket were disposed of as indicated:

Petition for leave to appeal denied.

APPENDIX D

Supreme Court of Illinois
Supreme Court Building
Springfield 62701

Juleann Hornyak
Clerk of the Court
(217) 782-2035

First District Court
20th Floor
160 N. LaSalle St.
Chicago 60601
(312) 793-1332

June 24, 2009

Telecommunications
Device for the Deaf
(217) 524-8132

Telecommunications
Device for the Deaf
(312) 793-6185

Mr. Paul V. Esposito
Clausen Miller P.C.
10 South LaSalle Street
Chicago, IL 60603-1098

In re: U.S. Bank, etc., respondent, v. YMCA of Metropolitan Chicago, etc., et al., petitioners.
No. 108246

Today the following order was entered in the captioned case:

Motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion denied.

Order entered by the Court.

This Court's mandate shall issue to the Appellate Court, First District, on July 2, 2009.

Very truly yours,

/s/

Clerk of the Supreme Court

cc: Mr. Robert A. Clifford
Mr. Joseph R. Curcio
Mr. Edward M. Kay
Mr. Robert P. Sheridan

APPENDIX E

01 L 4891 Roe Ann Lockhart vs. YMCA of Chicago

VERDICT FORM C 8102

We, the jury, find for the defendants YMCA, Metropolitan of Chicago and Terrell Sanderson, and against the plaintiff, U.S. Bank as Guardian and Representative of the Estate of Roe Ann Lockhart, a disabled minor.

	/s/
Assoc. Judge Dennis J.	Foreperson
Burke	/s/
May -5 2004	/s/
Circuit Court – 1744	/s/
	/s/
RB.	/s/
	/s/
FILED	/s/
May -5 2004	/s/
	/s/
Dorothy Brown	/s/
Clerk of Circuit Court	/s/

APPENDIX F

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ROE ANN LOCKHART, a minor by her Mother and next friend, Willie Mae LOCKHART,

Plaintiff,

vs.

YMCA OF CHICAGO, a corporation, TERRELL C. SANDERSON, as a duly authorized agent, servant and employee of THE YMCA OF CHICAGO, a corporation.

Defendants.

TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before the HON. DENNIS BURKE, one of the judges of said

Court, in his courtroom, Room 2306, Daley Center, Chicago, Illinois on Friday, February 25, 2005, at 1:30 o'clock p.m.

PRESENT:

MR. JOSEPH R. CURCIO,
MR. JOHN GOGGIN,
MS. PAULA CARSTENSEN,
MR. MARK SICKLES,
MR. CHRISTOPER MULLEN.

THE COURT: Good afternoon. Okay. Wherever you're comfortable. You can stay there or you can sit down. This is not going to take too long.

First of all, I apologize to all of the attorneys for the inconvenience I have caused. I apologize I had to cancel Wednesday, but there was no way I could come down.

Today this matter is up for ruling with respect to the Plaintiff's motion, post-trial motion with respect to Plaintiff Roe Ann Lockhart vs. YMCA. Paramount in a court of law is that justice is done for the individuals—here Roe Ann and The YMCA. When egos of attorneys and grandiose display of arrogance to the judicial system interferes with the rights of the parties, this Court of law has no alternative but to correct the wrongs committed by the professional officers of the court. Excuse me.

From the very beginning, the animosity amongst the attorneys for all parties was quite evident to this Court. Unfortunately, this behavior continued before the 12 sworn jurors. The transcript is replete with continued prejudicial comments and actions; but the transcript, though, does not reflect a direct observation of the Court while the court reporter repeatedly moved from the courtroom to the sidebars outside

the presence of the jury. On several occasions the Judge had to scramble to quickly close the courtroom door, and I note I have one of the best deputy sheriffs in the building, and he couldn't act quick enough to try to avoid the jury from hearing the loud outbursts. Even with the courtroom door shut, the Court repeatedly had to admonish the defense attorney to keep his voice down but to no avail. The Court notes that the comments off the record that the jurors heard were very prejudicial to the Plaintiff, as reported on several occasions by the sheriff to myself that the jury was in disbelief from hearing these outbursts. The loud comments made by Mr. Mannion were not accidental but purposefully made for the jury to hear.

The Court's understanding was that Mr. Mannion was brought in from Cleveland at the last moment to try this case because other counsel was unavailable. Defendant in this Court's mind had two capable counsel already involved in this case that could have tried the case.

As an aside, there was one time early in this case I had to admonish one of the other defense attorneys. After the admonishment with respect to some behavior, that behavior stopped in front of the Court and in front of the jury. He only had to be admonished once and it never happened again. The Court is lead to believe that Mr. Mannion also being admonished not once but on several occasions ignored the Court's effort, ignored the Court in an effort to divert justice. The outcome, the verdicts could have, might have been the same. I and we will never know. But Roe Ann did not receive a fair trial.

As a Judge, you try to control the trial, control the outbursts, bad behavior of the attorneys. Unfor-

tunately, it cannot always be done. What can be done is correct the wrongs of an attorney, and that is what I will do. The Court knows this is the right decision because of Mr. Mannion's repeated trips to my chambers at the end of the day to apologize for his behavior. He knew he did wrong. This Court will not tolerate the conduct of an attorney who disrespects our sacred judicial and jury system.

Pursuant to Illinois case law, Plaintiff's motion is granted. Verdict is set aside. New trial will be granted. We will have a status date in 30 days.

MR. SICKLES: Thanks, Judge.

THE COURT: You're welcome.

MR. CURCIO: Will the status be before you, your Honor?

THE COURT: It will be before me. Thank you all.

(2)

No. 09-404

Supreme Court, U.S.
FILED
OCT 31 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

YMCA OF METROPOLITAN CHICAGO
AND TERRELL C. SANDERSON,

Petitioners,

v.

U.S. BANK, AS TRUSTEE OF
THE ROE ANN LOCKHART OBRA '93 TRUST, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF IN OPPOSITION

JOSEPH R. CURCIO
CURCIO LAW OFFICES
161 North Clark Street
Suite 2550
Chicago, IL 60601
(312) 321-1111

ROBERT A. CLIFFORD
ROBERT P. SHERIDAN
Counsel of Record
SEAN P. DRISCOLL
CLIFFORD LAW OFFICES
120 N. LaSalle Street
31st Floor
Chicago, IL 60602
(312) 899-9090

KENNETH CHESEBRO
1600 Massachusetts Avenue
Cambridge, MA 02138
(617) 661-4423

Attorneys for Respondents

October 31, 2009

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented

Whether this Court should grant review of a civil defendant's belatedly constructed federal due process attack on a state trial judge's grant of a new trial where:

(a) the federal due process issue was neither pressed in the state appellate court in the manner required by the court rules (it was raised only on rehearing) nor passed on by the court (which discussed only state-law authorities and did not mention due process);

(b) the federal due process issue formulated in the petition would be pertinent only if this Court first reached and resolved the antecedent issue of whether, under state law, a litigant has a "property" interest in a jury verdict which is subject to a pending motion for a new trial; and

(c) the federal due process issue is of only abstract interest in this particular case given the state appellate court's authoritative finding that state law afforded the civil litigant an ample opportunity to make an evidentiary record relating to its concerns, which it did not utilize (so that there was, in fact, no denial of due process on this record).

Table of Contents

Question Presented i

Table of Authorities iv

Jurisdiction 1

Statement 1

A. Trial Court Proceedings 2

B. Appellate Court Proceedings 5

Reasons for Denying the Petition 7

A. This Court Lacks Jurisdiction Over the Petition Because the Federal Due Process Issue Was Neither Pressed in the Manner Required by the Illinois Appellate Court's Rules Nor Passed on by the Court 7

B. The Federal Due Process Issue Could Only Be Reached If This Court First Decided an Issue Specific to Illinois Law Concerning Whether a Litigant Has a "Property" Interest in a Jury Verdict Which Is Subject to a Pending Motion for a New Trial 11

C. The Federal Due Process Issue Is of No Practical Importance to This Case Given the State Appellate Court's Authoritative Ruling That the YMCA Did Not "Make Any Effort" to Utilize Its Ample Opportunity Under Illinois Law to Make an Evidentiary Record Relating to Its Concerns 16

Conclusion 18

Table of Authorities

CASES: PAGE:

Adams v. Robertson, 520 U.S. 83 (1997) 7-8
Barton v. Chicago and North Western Transp. Co., 757 N.E.2d 533 (Ill. App. 2001) 17
Beck v. Washington, 369 U.S. 541 (1962) 8
Belfield v. Coop, 134 N.E.2d 249 (Ill. 1956) 15
Board of Regents v. Roth, 408 U.S. 564 (1972) .. 6, 15
Bowe v. Scott, 233 U.S. 658 (1914) 9-10
City of Chicago v. Pridmore, 147 N.E.2d 54 (Ill. 1957) 15
Clark v. Arizona, 548 U.S. 735 (2006) 7
Elizer v. Louisville & Nashville R. Co., 261 N.E.2d 827 (Ill. App. 1970) 3
Ex parte R.D.N., 918 So.2d 100 (Ala. 2005) 12
Freeman v. Chicago Transit Authority, 210 N.E.2d 191 (Ill. 1965) 15
Greene v. McElroy, 360 U.S. 474 (1959) 12
Hooker v. Los Angeles, 188 U.S. 314 (1903) 15
Hopt v. Utah, 110 U.S. 574 (1884) 11
Howell v. Mississippi, 543 U.S. 440 (2005) (per curiam) 10
In re Oliver, 333 U.S. 257 (1948) 11
Louisville & Nashville Railroad Co. v. Schmidt, 177 U.S. 230 (1900) 17
Morgan v. United States, 304 U.S. 1 (1938) 12
New York Cent. & Hudson River R.R. Co. v. New York, 186 U.S. 269 (1902) 10
People v. Cooper, 75 N.E.2d 885 (Ill. 1947) 10
People v. Hobley, 696 N.E.2d 313 (Ill. 1998) 17
People v. Marker, 908 N.E.2d 16 (Ill. 2009) 17
People v. Rivers, 102 N.E.2d 303 (Ill. 1951) 9-10
Remmer v. United States, 347 U.S. 227 (1954) ... 13
Shields v. United States, 273 U.S. 583(1927) 11
Southern Ry. Co. v. Virginia, 290 U.S. 190 (1933) . 12

CASES (CONTINUED): PAGE:

Stephans v. Chicago Transit Authority, 171 N.E.2d 229 (Ill. App. 1960) 17
Street v. New York, 394 U.S. 576 (1969) 8
United States v. U.S. Gypsum Co., 438 U.S. 422(1978) 12
Webb v. Webb, 451 U.S. 493 (1981) 8
Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963) 12
Wolfe v. Menard, Inc., 846 N.E.2d 605 (Ill. App. 2006) 17
Wozniak v. Segal, 308 N.E.2d 611 (Ill. 1974) 15
Yost v. Johnson, 591 A.2d 178 (Del. 1991) 12

CONSTITUTIONS, STATUTE, RULE, ARTICLE:

U.S. Const. Amend. XIV, § 1 6
28 U.S.C. § 1257(a) 1, 7
Ill. Const., art. I, § 2 10
Illinois S. Ct. Rule 341(h)(7) 6, 9
John Leubsdorf, *Constitutional Civil Procedure*, 63 Tex. L. Rev. 579 (1984) 15

BRIEF IN OPPOSITION

Jurisdiction

The YMCA has not met its burden to show that its federal due process argument was "specially set up or claimed" in the Illinois appellate court below as required by 28 U.S.C. §1257(a). In its opening brief on appeal below, the YMCA invoked only state-law authority. Accordingly, the Illinois appellate court did not consider federal due process (or any other aspect of federal law) in its decision. See pp. 5-11, *infra*.

Statement

The YMCA seeks review of a federal due process issue which it did not raise in its merits briefs in the Illinois appellate court below. The YMCA relies on 26 federal court decisions, *not one* of which it cited in its merits briefs, which cited only state-court cases construing state law. Federal due process was argued only on rehearing, and the court ignored the argument (appropriately, as under the Illinois rules it had been waived). This Court therefore lacks jurisdiction to hear the petition.

Even if jurisdiction somehow existed, the YMCA's petition is predicated on it being able to start with the "what process is due?" aspect of due process analysis. The decisions it cites involve civil or criminal defendants whose traditional interests in life, liberty, or property were allegedly threatened by procedural irregularities tainting the decision process of the ultimate factfinder. None involved a motion for a new trial decided by a judge not serving as the ultimate factfinder. This Court could not reach the issue pressed by the YMCA without first deciding an antecedent issue of whether Illinois law conveys on litigants any

"property" interest in a jury verdict which is subject to a pending motion for a new trial. Even if the YMCA's failure to preserve and present that issue could be excused, this state-law-focused issue is hardly a strong candidate for plenary review.

In any event, even if this Court were inclined to believe that it can and should review the federal due process issue identified by the YMCA, the Illinois appellate court made an authoritative finding under Illinois law (one not addressed in the petition) which resolves any due process concern. It held that state law afforded the YMCA an ample opportunity for an on-the-record evidentiary hearing into its concerns which it did not "make any effort" to pursue. Pet. App. at 16a.

A. Trial Court Proceedings

On January 8, 2001, Roe Ann Lockhart (age 12), while crossing a street in a Chicago suburb, was struck by a YMCA minivan driven by a YMCA employee. She was severely injured. Pet. App. at 2a, 6a-11a.

Respondent U.S. Bank is the trustee of Ms. Lockhart's interests. Although the YMCA's driver is included as a petitioner (despite having been dismissed as a party several years ago), for clarity we will reference petitioners as simply "YMCA." Likewise, we will reference respondents as simply "Lockhart."

Lockhart sued the YMCA for damages, and the matter went to trial in 2004. The trial resulted in a verdict for the YMCA, with Lockhart recovering nothing. Pet. App. at 2a, 31a.

Lockhart filed a motion for a new trial. Record, Vol. 17, at C4152-C4219. Her 68-page motion set forth numerous errors and irregularities in the trial which rendered it unfair as a whole. Six pages of her motion

(reproduced in the attached **Appendix A**) were devoted to explaining how Lockhart was denied a fair trial due to unfounded accusations made by one of the defense lawyers who, throughout the trial at sidebar conferences, in a loud voice which was meant to be, and was, overheard by the jurors, portrayed himself as the victim of wrongdoing and unfair treatment by both Lockhart's counsel and the trial judge. Lockhart App. at 11a-17a. In her brief, Lockhart asked the trial judge to rely on not just the transcript, but on what he had "personally witnessed," *id.* at 11a,[1] and emphasized how defense counsel's "'McEnroe/Knight' strategy of casting themselves as the victim of wrongdoing and unfair treatment" had "continued throughout . . . this trial," accompanied by "[v]ocal guffaws, histrionic eye rolls, and distracting body language . . . ." *Id.* at 17a.

Although the YMCA filed a detailed opposition to Lockhart's motion for a new trial, in which it set forth a rebuttal to nearly every section of her motion, it did not rebut the allegations set forth in these six pages. Record, Vol. 19, at C4666-C4700. Nor did the YMCA use time at oral argument to address the allegations in these six pages. Record, Vol. 29, at 242; Record, Vol. 30, at 6-17. The matter was submitted to the trial judge with these allegations unrebutted.

Skipping over the many other arguments Lockhart had made in favor of a new trial, in rendering its ruling the trial court focused on the allegations the YMCA

---

[1] This request was appropriate under well-established Illinois law. *E.g.*, *Elizer v. Louisville & Nashville R. Co.*, 261 N.E.2d 827, 829-30 (Ill. App. 1970) (appellate courts defer to findings predicated on aspects of a trial not reflected in the transcript, because "[t]he attitude and demeanor of counsel and the general atmosphere of the trial are observed by the trial court, and cannot be reproduced in the record on appeal").

had left unrebutted. It granted Lockhart a new trial based on its finding "that repeated, deliberate outbursts by trial counsel for the defendants were heard by the jury and prejudiced [Lockhart], denying [her] a fair trial." Pet. App. at 2a; *see also id.* at 4a-6a, 32a-35a. "The trial court made a specific factual finding that the outbursts by defense counsel were not accidental but were 'purposefully made for the jury to hear.'" *Id.* at 5a. "The trial court added that defense counsel had been repeatedly admonished but counsel had 'ignored the Court in an effort to divert justice" — and "that defense counsel repeatedly came into the court's chambers at the end of a day's trial session and apologized to the trial court for his behavior, thus demonstrating that defense counsel knew that his behavior was wrong." *Id.*

As part of his ruling, the trial judge disclosed information he had relied on, in part, as confirming that the jury had overheard the remarks: a deputy sheriff (acting as bailiff) "reported on several occasions . . . that the jury was in disbelief from hearing these outbursts." Pet. App. at 34a; *see also id.* at 5a. During the court session in which the judge announced his ruling, the YMCA made no objection to the judge's reliance on these reports, nor to the judge's reliance on his own personal observations during the trial. *Id.* at 32a-35a. The YMCA did not seek reconsideration of the trial judge's ruling. (It sought only interlocutory appellate review, which was denied, Pet. at 4, a procedural aspect of the case which is no longer relevant because those efforts did not add anything to the record, and the YMCA does not seek review of the earlier appellate rulings.)

Neither at that court session nor in the months that followed before the second trial commenced did the YMCA seek to obtain the testimony of the bailiff or any

of the jurors, through an evidentiary hearing or otherwise. Pet. App. at 16a. Just as the YMCA had made no effort to rebut the allegations made by Lockhart in her motion for a new trial, the YMCA made no effort to rebut the findings of the trial judge announced from the bench.

At the second trial held in 2006, in which defense counsel's course of misconduct was not repeated, a new jury found in favor of Lockhart, awarding her approximately $15.5 million in damages for her injuries, past and future suffering, and past and future medical needs (after a 30% reduction for comparative negligence, and various setoffs). Pet. App. at 12a.

B. Appellate Court Proceedings

Following the entry of final judgment, the YMCA filed an appeal as of right in the Illinois intermediate appellate court. Of the 58 pages of text in its opening brief, the YMCA allocated fifteen pages to arguing that the verdict of the original jury in its favor should be reinstated because the trial court had erred in granting a new trial. YMCA App. Ct. Br. at 27-41. The YMCA cited thirteen decisions, all from state courts, and all interpreting state law. It cited none of the decisions cited in its current petition. (Pet. at 5 includes an out-of-context quotation from that brief; to ensure this Court has the needed context, the YMCA's full argument in its brief is reprinted as **Appendix B**.)

Citing only state-court decisions interpreting state law, the appellate court rejected the YMCA's claim that the trial judge had erred in granting the new trial. Pet. App. at 12a-17a. Regarding the YMCA's "complain[t] that the trial court launched no formal inquiry after being told by the deputy sheriff of the jurors' comments," the court observed that the YMCA had offered

"no support for its argument," *id.* at 14a; that "[t]he trial judge was obviously present" during the misconduct at issue, *id.*; that "based upon his own observations in conducting the trial, the trial judge made factual findings that defense counsel made these comments with the *deliberate intent* that the jury hear them, in an effort to 'divert justice,'" *id.* at 15a; and that "[t]he trial court also found that defense counsel knew his conduct was improper." *Id.* As to the trial judge's delay in disclosing what "his deputy sheriff informed him of the jurors' comments," the appellate court held that the delay did "not affect the trial court's decision making process," and further held that after the trial judge's ruling the YMCA had at least six months in which it "could have taken issue with the judge's findings and made a record regarding those points that [it] believed refuted the trial judge's opinion and ruling," during which it "fail[ed] to make any effort to provide a record contradicting the trial court's findings . . . ." *Id.* at 16a.

Following its loss in the intermediate appellate court, the YMCA filed a petition for rehearing. Pet. at 6. (A copy of the relevant section is reprinted as **Appendix C**.) In it, for the first time the YMCA cited the federal Constitution and federal case law to advance the argument that its "rights to due process were violated by Judge Burke's decision . . . ." Pet. for Rehearing at 1 (Lockhart App. at 39a) (citing U.S. Const. Amend. XIV, § 1; *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)). However, the Illinois appellate courts follow a strict rule that no new arguments will be considered at the rehearing stage. Illinois S. Ct. Rule 341(h)(7) ("Points not argued [in the opening brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). The court denied rehearing without comment. Pet.

App. at 26a-27a. The YMCA's efforts to obtain discretionary review in the Illinois Supreme Court were unsuccessful. Pet App. at 28a-30a.

Reasons for Denying the Petition

A. This Court Lacks Jurisdiction Over the Petition Because the Federal Due Process Issue Was Neither Pressed in the Manner Required by the Illinois Appellate Court's Rules Nor Passed on by the Court

Under the pertinent statutory language, this Court has jurisdiction to review the YMCA's federal due process claim only if the federal due process claim was "specially set up or claimed" in the Illinois intermediate appellate court (which in this case is "the highest court of a State in which a decision could be had," 28 U.S.C. § 1257(a); *e.g.*, *Clark v. Arizona*, 548 U.S. 735, 746-47 (2006)). The YMCA's claim will not be considered by this Court "unless it was either addressed by or properly presented to the state court that rendered the decision . . . ." *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

The YMCA's federal due process claim was not addressed in the decision of the Illinois appellate court. That decision merely addressed the "YMCA's claim that the trial court in the first trial erred" in granting a new trial. Pet. App. at 12a. It was bereft of any reference to federal due process, the federal Constitution, or any decisions interpreting federal law. The court merely reviewed the trial judge's order and the parties' conflicting arguments, "under an abuse of discretion standard," applying the ordinary standard of review. *Id.* It cited only Illinois decisions interpreting Illinois law. *Id.* at 12a-17a. It held that it could "find

no abuse of discretion by the trial court and thus no error in the granting" of the new trial. *Id.* at 17a.

Accordingly, the YMCA makes no suggestion in its petition that the Illinois appellate court actually decided a federal due process issue, that is, by analyzing legal principles or authorities bearing on federal due process. Rather, the best the YMCA can do is to note that the appellate court rejected the argument it made. Pet. at 5 (citing Pet. App. at 14a).

Everything, then, turns on this: *what argument did the YMCA make* in its briefing before the Illinois appellate court which that court found to be without support? Because the court "did not expressly address" the federal due process issue, this Court will "assume that the issue was not properly presented," so that the YMCA "bears the burden of defeating this assumption" by showing that properly raised the issue before the state court. *Adams*, 520 U.S. at 86-87. *E.g.*, *Street v. New York*, 394 U.S. 576, 582 (1969) (when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.").

A tell-tale sign of weakness in the YMCA's position is its reliance on the federal due process argument it sketched in seeking rehearing in the Illinois appellate court, filed *after* that court held there was no support for the YMCA's argument. Pet. at 6. However, the YMCA must show it presented a federal due process claim to the Illinois appellate court "at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981); *see also Adams*, 520 U.S. at 87; *Beck v. Washington*, 369 U.S. 541, 549-54 (1962). Under Illinois law, an appellant cannot preserve an argument on rehearing; all arguments must be made,

or else waived, in the opening brief. Illinois S. Ct. Rule 341(h)(7) ("Points not argued [in the opening brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). "[I]t is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of his court unless the court below in dealing with the petition considers and passes upon the Federal ground therein relied upon . . . ." *Bowe v. Scott*, 233 U.S. 658, 663 (1914).

In its petition for certiorari, the YMCA cites only one page of its opening brief in the Illinois appellate court. On that page is a short paragraph in which it summarized an Illinois appellate court decision holding in a criminal case "that a trial court's extrajudicial investigation deprives a party of its due process rights to a fair and open proceeding . . . ." YMCA App. Ct. Br. at 31 (Lockhart App. at 25a) (citing *People v. Rivers*, 102 N.E.2d 303 (Ill. 1951)) (cited in Pet. at 5). The YMCA relies on no other part of its opening brief.

The YMCA's passing reference to "due process" would hardly have put the Illinois appellate court on notice that it was advancing a *federal* due process argument. Its failure to cite any federal law authority meant, under the relevant rule, that no federal law argument was being made. *See* Illinois S. Ct. Rule 341(h)(7) ("Argument . . . shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities . . . relied on. . . . Points not argued are waived . . . .").

Nor did the passing reference to "due process" meet this Court's standards for preserving a federal due process issue. Where a particular state constitution has a due process clause (as is the case with Illinois, *see* Ill. Const., art. I, § 2), any references to "due process"

in briefing before the state courts will be deemed to invoke the state constitution only. *E.g.*, *Bowe*, 233 U.S. at 664-65. If a litigant wishes to invoke a federal constitutional provision, it must be listed. *New York Cent. & Hudson River R.R. Co. v. New York*, 186 U.S. 269, 273 (1902). This rule has been in place for a century. It hardly burdens a litigant advancing a due process claim to insist that it add the label "federal" if it wishes to invoke federal due process. *Howell v. Mississippi*, 543 U.S. 440, 443-44 (2005) (per curiam).

Beyond the background presumption that only a state constitution is being invoked where the word "federal" is omitted, it is affirmatively clear from an analysis of the authority cited by YMCA in its brief below that its reference to "due process" sounded in Illinois constitutional law alone. The *Rivers* case cited by the YMCA was a criminal prosecution in which the trial judge was alleged to have conducted a private investigation of the case, "depriving [the defendants] of their constitutional right to a fair and impartial trial and to be confronted by the witnesses against them." *People v. Rivers*, 102 N.E.2d 303, 306 (Ill. 1951). *Rivers* held that "[a]ny private investigation by the court . . . constitutes a denial to the defendant of the constitutional guarantee of due process of law," citing no federal authority, but only a state-court case. *Id.* That case, *People v. Cooper*, 75 N.E.2d 885 (Ill. 1947), in turn cited no federal authority and relied on only one constitutional provision: the confrontation clause of the Illinois Constitution. *Id.* at 887. Thus, even a "daisy chain" approach to seeing whether a federal issue was somehow presented in state-court briefing (through study of the cases cited in the cases cited by a litigant), *see Howell*, 543 U.S. at 443-44, reveals that the YMCA did not preserve a federal due process issue

for review. It did nothing to put the Illinois appellate court on notice of any federal-law argument.

Thus, this Court lacks jurisdiction over the issue presented in the petition.

B. The Federal Due Process Issue Could Only Be Reached If This Court First Decided an Issue Specific to Illinois Law Concerning Whether a Litigant Has a "Property" Interest in a Jury Verdict Which is Subject to a Pending Motion for a New Trial

Even if there were some basis for finding jurisdiction, the YMCA's petition is based on a flawed premise: that the only federal due process question to be decided is "what process is due?" That was the appropriate question put by the defendants in the cases on which the YMCA relies in its petition. In them, typically a defendant: (1) was before a factfinder whose decision might deprive the defendant of life,[2] a traditional liberty interest (e.g, through imprisonment,[3] or impair-

---

[2] *Hopt v. Utah*, 110 U.S. 574, 577, 579 (1884) (murder defendant was sentenced to death by a jury which included two jurors challenged for actual bias, as to whom the voir dire had been conducted outside defendant's presence) (cited in Pet. at 11, 22).

[3] *In re Oliver*, 333 U.S. 257, 258-60, 265, 273 (1948) (witness before a "one-man grand jury" investigation conducted by judge was summarily jailed for 60 days, without the filing of charges, representation by counsel, or a hearing; judge ruled witness had lied, basing his finding of contempt on testimony from another witness who had earlier testified in secret) (cited in Pet. at 9); *Shields v. United States*, 273 U.S. 583, 584-86 (1927) (criminal defendant sentenced to year in jail after trial judge gave two supplemental charges in defendant's absence) (cited in Pet. at 15-17).

ment of child custody[4]), or a traditional property interest (e.g., through imposition of damages,[5] injury to real property,[6] or interference with employment[7] or business[8]); and (2) the factfinder's decisionmaking integrity was compromised through *ex parte* exposure to information concerning the case.

---

[4] *Yost v. Johnson*, 591 A.2d 178, 179-82 (Del. 1991) (cited in Pet. at 23-24) (mother lost custody of her children through an order of a Delaware family court judge who predicated jurisdiction on an *ex parte* conversation with a Virginia family court judge); *Ex parte R.D.N.*, 918 So.2d 100, 104-05 (Ala. 2005) (family law judge rejected father's child custody petition based in part on *ex parte* communications with child's guardian ad litem) (cited in Pet. at 24).

[5] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 431-33, 459-62 (1978) (previously hung jury convicted defendants of price-fixing conspiracy after judge pressed for a verdict during *ex parte* conversation with jury foreman) (cited in Pet. at 26).

[6] *Southern Ry. Co. v. Virginia*, 290 U.S. 190, 193-95 (1933) (with no prior notice or hearing, a state agency ordered a railway company to eliminate a grade crossing at a particular location, and build an overpass) (cited in Pet. at 12, 20).

[7] *Greene v. McElroy*, 360 U.S. 474, 478-82, 485-86, 492-93 & n.22, 496, 508 (1959) (executive at defense contractor was fired and unable to work in industry after federal agency revoked his security clearance based on compilations of various witness interviews never made available to executive) (cited in Pet. at 8, 10, 13-14, 26); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 104-06 (1963) (bar applicant denied admission based on confidential reports, without a hearing) (cited in Pet. at 2, 13-14, 20).

[8] *Morgan v. United States*, 304 U.S. 1, 18, 22 (1938) (Secretary of Agriculture allegedly capped charges at stockyards based on *ex parte* discussions with government prosecutors, with no notice to affected persons of the claims presented) (cited in Pet. at 12-13).

For example, in *Remmer v. United States*, 347 U.S. 227 (1954), which the YMCA calls perhaps the "clearest" decision in its favor, Pet. at 15 (it is featured as the lead precedent, Pet. at i, 1), a criminal defendant was on trial for tax evasion. During the trial, the jury foreman had discussions with the judge and the FBI about an apparent attempt to bribe the foreman made by someone apparently allied with the defendant. The prosecutors were briefed but the defendant and his counsel were kept in the dark. The foreman remained on the jury, and the jury convicted the defendant. *Id.* at 228. After the verdict, defense counsel learned of the *ex parte* discussions and sought a new trial, which was denied. *Id.* at 228-29. This Court held that any *ex parte* communications "with a juror during a trial about the matter pending before the jury" in a criminal case are "presumptively prejudicial," *id.*, at 229, and held that a new trial was required if prejudice was confirmed. *Id.* at 230.

There is nothing about this case similar to the cases relied on in the petition. The ultimate factfinder in the first trial was the jury, not the judge. Despite the pages devoted by the petition to summarizing the rule against *ex parte* judge-jury communications during trial, Pet. at 14-18, there is no allegation that the judge in the first trial communicated anything *to* the jury on an *ex parte* basis and thus, unlike the cases relied on by the YMCA, no suggestion that the jury's decision was tainted (and, of course, the YMCA won before the first jury, so it could not have been injured by any taint). It was a one-way communication: the judge learned information about the jury having heard defense counsel's outbursts, via a deputy sheriff who had overheard jurors' remarks while serving as bailiff.

On what basis, then, could the YMCA try to assert that a federal due process analysis can be brought to

bear in this case? Inasmuch as the target of the YMCA's attack is the trial judge's decision not to permit the first jury's verdict to stand as a judgment, and his decision instead to order a new trial, the theory presumably would be that the moment the first jury returned its verdict, the YMCA obtained a "property" interest in that verdict, even though it was subject to a motion for a new trial — "property" of which it was deprived when the judge decided, based on all the information available to him (including comments about the jury made to him by his bailiff), that the interests of justice required a new trial.

The YMCA offers no federal authority specifically endorsing its theory that it has some sort of "property" interest in a jury verdict which is subject to a motion for a new trial (indeed, it cites no case in which a civil defendant raised any due process objection to the grant of a new trial). Instead, the YMCA extracts from the decisions it cites the concept that a litigant is entitled to due process regarding those court rulings which are "critical" or "substantial," or "dispositive," or which "alter the outcome" of trials.[9] The vagueness of its formulation illustrates the absence of any clear law on this subject, and its failure to lay out for this Court the rationale for review of the threshold "property" question which is antecedent to the "what process is due?" question focused on by the petition.

---

[9] Pet. at 14 (suggesting that "dispositive rulings" and "all critical stages of a trial proceeding" are subject to federal due process scrutiny); Pet. at 22 (suggesting that rulings which "alter the outcome of a trial or otherwise affect a litigant's substantial rights" are subject to federal due process scrutiny); Pet. at 27 (suggesting that rulings which "affect substantial rights" are subject to federal due process scrutiny).

It seems unlikely that the answer to whether the YMCA had a "property" interest in the verdict of the first jury lies in an analysis of federal law, particularly given that this Court has been reluctant to constitutionalize the civil procedure rules followed by state courts, thereby leaving room for a variety of approaches. *E.g.*, *Hooker v. Los Angeles*, 188 U.S. 314, 318 (1903) ("The Fourteenth Amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard."); *see generally* John Leubsdorf, *Constitutional Civil Procedure*, 63 Tex. L. Rev. 579, 580-87 (1984).

Generally speaking, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Here, the YMCA has not pointed to any provision of Illinois law which might lead litigants to understand or expect that they have any particular right to keep as a final judgment a jury verdict which is subject to a pending motion for a new trial. To the contrary, Illinois has long provided that a trial judge may order a new trial, based on a wide variety of considerations and has broad discretion to do so in the service of the ends of justice. *E.g.*, *Wozniak v. Segal*, 308 N.E.2d 611, 612 (Ill. 1974); *Freeman v. Chicago Transit Authority*, 210 N.E.2d 191, 193-94 (Ill. 1965); *City of Chicago v. Pridmore*, 147 N.E.2d 54, 57-58 (Ill. 1957); *Belfield v. Coop*, 134 N.E.2d 249, 259 (Ill. 1956).

The system applies evenhandedly; the YMCA does not suggest it is skewed to advance the interests of either defendants or plaintiffs as a class. All litigants are put on thereby put on notice that they *cannot* count

on keeping verdicts in their favor entered as judgments, and that all verdicts are subject to the discretionary authority of trial judges to grant new trials. This system has the salutary effect of discouraging lawyers from engaging in misconduct to obtain favorable jury verdicts, given that trial judges enjoy ample discretion to refuse to enter such verdicts. Even if there were room for doubting the wisdom of this approach and even if the YMCA's failure to preserve and present the threshold due process issue could be excused, this state-law-focused issue is hardly a strong candidate for plenary review — and without review of this logically antecedent issue, the federal due process issue on which the YMCA focuses cannot be reached.

C. The Federal Due Process Issue Is of No Practical Importance to This Case Given the State Appellate Court's Authoritative Ruling That the YMCA Did Not "Make Any Effort" to Utilize Its Ample Opportunity Under Illinois Law to Make an Evidentiary Record Relating to Its Concerns

Finally, even if this Court were inclined to believe that it can and should review the federal due process issue, the Illinois appellate court made an authoritative finding under Illinois law (one not addressed in the petition) which resolves any due process concern. It held that state law afforded the YMCA an ample opportunity for an on-the-record evidentiary hearing into its concerns which it did not "make any effort" to pursue. Pet. App. at 16a. *See also* p. 6, *supra*. Although the YMCA has not disputed the correctness of

the analysis of Illinois law on which this holding was based, there is clearly ample support for it.[10]

Based on the record of this case and the relevant provisions of Illinois civil procedure, the Illinois appellate court held that the YMCA had a full opportunity to make an evidentiary record relating to its concerns, which it did not utilize — so that there was, in fact, no denial of due process on this record. Under a decision of this Court cited by the YMCA, that finding based on state law is authoritative. *Louisville & Nashville Railroad Co. v. Schmidt*, 177 U.S. 230, 237 (1900) ("The conclusions of fact found by the court of last resort of Kentucky" regarding a company having acted as a *de facto* party "are not subject to reexamination by this court . . . [a]ccepting as we do the interpretation placed by the courts of last resort of Kentucky on the law of that State") (cited in Pet. at 11). There is thus no practical point to the YMCA's petition, which invokes *Remmer* and similar cases in an effort to obtain a hearing regarding the *ex parte* communications at issue, to put them on the record. The YMCA enjoyed

---

[10] The YMCA had months to seek reconsideration of the trial court's grant of a new trial before the second trial commenced, during which period the trial court retained jurisdiction to modify its order (even while the YMCA pursued an interlocutory appeal). *E.g.*, *People v. Marker*, 908 N.E.2d 16, 22-28 (Ill. 2009); *Stephans v. Chicago Transit Authority*, 171 N.E.2d 229, 231 (Ill. App. 1960). Illinois law permits parties to collect and present, on post-trial motions, "juror testimony or affidavits which are offered as proof of improper extraneous influences on the jury." *People v. Hobley*, 696 N.E.2d 313, 339 (Ill. 1998). "The inquiry may extend to asking jurors whether they were exposed to extraneous information by others and, if so, what information was exchanged." *Barton v. Chicago and North Western Transp. Co.*, 757 N.E.2d 533, 553 (Ill. App. 2001). *See also Wolfe v. Menard, Inc.*, 846 N.E.2d 605, 614-18 (Ill. App. 2006).

the opportunity for a hearing, years ago, under Illinois law. There is no reason for this Court to devote its resources to this case to consider whether or not to invoke federal due process to furnish a litigant with an option which it has already once declined.

Conclusion

For all the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

Joseph R. Curcio
CURCIO LAW OFFICES
161 North Clark Street
Suite 2550
Chicago, IL 60601
(312) 321-1111

ROBERT A. CLIFFORD
ROBERT P. SHERIDAN
Counsel of Record
SEAN P. DRISCOLL
CLIFFORD LAW OFFICES
120 N. LaSalle Street
31st Floor
Chicago, IL 60602
(312) 899-9090

KENNETH CHESEBRO
1600 Massachusetts Avenue
Cambridge, MA 02238
(617) 661-4423

Attorneys for Respondents

October 31, 2009

TABLE OF APPENDICES

APPENDIX A

Plaintiff's Post-Trial Motion in *U.S. Bank, as Trustee of the Roe Ann Lockhart Obra '93 Trust v. YMCA of Metropolitan Chicago*, Cir. Ct. of Cook County, Illinois, County Dep't, Law Div. (No. 01 L 4891) (excerpts) 1a

APPENDIX B

Brief of Defendants-Appellants YMCA of Metropolitan Chicago and Terrell C. Sanderson in *U.S. Bank, as Trustee of the Roe Ann Lockhart Obra '93 Trust v. YMCA of Metropolitan Chicago*, Appellate Court of Illinois, First Judicial Dist. (No. 07-487) (excerpts) 20a

APPENDIX C

Petition for Rehearing of Defendants-Appellants YMCA of Metropolitan Chicago and Terrell C. Sanderson in *U.S. Bank, as Trustee of the Roe Ann Lockhart Obra '93 Trust v. YMCA of Metropolitan Chicago*, Appellate Court of Illinois, First Judicial Dist. (No. 07-487) (excerpts) . 38a

APPENDIX A

06/30/04

**IN THE
CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT
LAW DIVISION**

U.S. BANK, as Guardian and Representative of the Estate of ROE ANN LOCKHART, a disabled minor,	)	
Plaintiff,	)	
vs.	)	No. 01 L 4891
YMCA OF METROPOLITAN CHICAGO, a corporation, TERRELL C. SANDERSON, as a duly authorized agent, servant and employee of the YMCA OF METROPOLITAN CHICAGO, a Corporation.	)	
Defendants.	)	

PLAINTIFF'S POST-TRIAL MOTION

NOW COMES the Plaintiff, U.S. BANK, as Guardian and Representative of the Estate of ROE ANN LOCKHART, a disabled minor, by and through its attorneys, JOSEPH R. CURCIO, LTD., and in support of its post-trial motion states as follows:

INTRODUCTION

This lawsuit arises out of an automobile-pedestrian collision on January 8, 2001 whereby the minor plaintiff, Roe Ann Lockhart, was rendered quadriplegic and severely brain damaged as a result of being struck by a van operated by the defendant, Terrell C. Sanderson. On April 15, 2004, this matter was assigned for trial to the Honorable Dennis Burke, and on May 5, 2004, the jury concluded their deliberations and found in favor of Defendants and against Plaintiff. Based upon numerous grounds that will be discussed at length in the following motion, Plaintiff was denied a fair trial and now seeks this Honorable Court grant her request for a new trial. **[2]**

PREFATORY NOTE

What And How, Before A Look At Why.

Before beginning a discussion of why Plaintiff believes she[1] is entitled to post-trial relief, a discussion of precisely what Plaintiff wants and just how this Court should view that request is necessary. Despite the fact that post-trial motions are filed after, most jury verdicts, post-trial motion practice is generally misunderstood by the trial bar. Many attorneys fail to grasp the true purpose of the post-trial motion or do not recognize that the trial judge assumes a new and substantially different role once the post-trial process begins. This lack of understanding can result in a disservice to both this Court and subsequent reviewing courts if the parties address the motion or its response as nothing more than a formality. Therefore, although

---

[1] This brief will employ feminine pronouns to refer to the minor Plaintiff, even though "the Plaintiff" is a financial institution.

Plaintiff is well aware of the breadth of this Court's knowledge of the law, she asks this Court's indulgence as she sets out *what* she seeks in this motion and *how* she believes this request should be considered before she turns to the much more detailed discussion of *why* such relief is warranted in this instance:

A. Relief Requested.

What Plaintiff seeks in her motion is simple — she asks this Court to set aside the jury verdict and order a new trial.

B. Standards for Review.

Although left within the jurisdiction of the trial court, the post-trial motion is not really part of a civil trial. The post- trial motion is in fact the first, and the *most important*, step in the process of appellate review. Indeed, one of the principal reasons for **[3]** *requiring* the filing of a post-trial motion after a jury trial is that such a motion will eliminate unnecessary appeals by allowing the trial judge to grant a new trial without requiring either the parties or the court system to engage in the lengthy and expensive process of presenting briefs and argument in the reviewing courts. See *Allott Plumbing v. Owens-Corning*, 112 Ill. App. 3d 136, 444 N.E.2d 1390 (3rd Dist. 1983).

Thus, the post-trial motion must set out issues in a specific and detailed fashion since the motion is intended to not only provide a court with the opportunity to reconsider rulings previously made — but to reconsider them in a significantly different light than they were viewed during the course of the trial, As the Supreme Court observed in *Brown v. Decatur Memorial Hospital*, 83 Ill.2d 344, 415 N.E.2d 337 (1980), post-trial motions must be specific and detailed as

such specificity "allows the decision maker who is most familiar with the events at trial, the trial judge, to review his decisions without the pressure of an ongoing trial and to grant a new trial if, on reconsideration, he concludes his earlier decision was incorrect." *Id.* at 349.

Further, when reviewing the results of a trial, the trial judge is placed in a position superior to the members of the reviewing court who may ultimately have to consider the same issues:

> The purpose of vesting the trial judge with power to grant a new trial is to permit him, before losing jurisdiction of the case, to correct errors that he or the jury might have made during the course of the trial. Courts of review have repeatedly stated that they will not disturb the decision of the trial court on a motion for new trial unless a clear abuse of discretion is affirmatively shown. The reason for this rule is that the trial court has had the opportunity *to consider the conduct of the trial as a whole, and therefore, is in a superior position to consider the effects of errors which occurred, the fairness of the trial to all parties, and whether substantial justice was accomplished.*

[4]

Magnani v. Trogi, 70 Ill. App. 2d 216, 220, 218 N.E.2d 21 (2nd Dist. 1966) (emphasis supplied).

Thus, post-trial review is not simply a "ritualistic" first step in the review process. Placing the trial judge in this superior position arid granting him such broad discretion was intended to have the "salutary effect of promoting both the accuracy of decision making and the elimination of unnecessary appeals," *Brown v.*

Decatur Memorial Hospital, 83 Ill.2d at 350, 415 N.E.2d 337. And, to achieve the goals of eliminating unnecessary appeals and ensuring that the jury's verdict does substantial justice to the parties, "[a] trial court is allowed greater latitude in granting a new trial than in denying one." *Torrez v. Raag*, 43 UI. App. 3d 779, 782, 357 N.E2d 632 (2nd Dist. 1976). *See also Kolakowski v. Voris*, 94 Ill. App. 3d 404, 409-410, 418 N.E.2d 1003 (1st Dist. 1981).

This emphasis on according the trial judge the broadest possible latitude in granting a new trial does not arise from purely philosophical grounds. It rests on very practical considerations. In passing on the motion for new trial, the trial judge has the benefit of having actually observed the participants, their manner of speaking, and the general circumstances which aid in the determination of their credibility and the weight properly accorded to their testimony. This vantage point is not shared by any reviewing court, which must consider the trial based on the cold words which appear in the transcript. Reviewing courts therefore generally defer to a trial judge's decision that substantial justice required setting aside all or part of a jury verdict and a new trial. *See Harrison v. Chicago Transit Authority*, 48 Ill. App. 3d 564, 363 N.E.2d 81(1st Dist. 1977) and *Magnani*, 70 Ill.App.2d at 220, 218 N.E.2d 21. **[5]**

Recognizing his superior position, and keeping in mind the goals of doing substantial justice and avoiding unnecessary appeals, the trial judge's decision to grant a new trial is not measured by the more stringent evidentiary standards applicable to motions for summary judgment or directed verdict or the entry of a judgment *non obstante veredicto* as part of a post-trial motion. Instead, the trial judge is permitted to

"weigh the evidence and set aside the verdict and order a new trial if the verdict is contrary to the manifest weight of the evidence." *Reuter v. Kocan*, 113 Ill. App. 3d 903, 908, 446 N.E.2d 882 (2nd Dist. 1983), citing *Mizowek v. DeFranco*, 64 Ill.2d 303, 310, 356 N.E.2d 32 (1976). Thus, the "evidentiary standard for granting a new trial is less conclusive than that for directing a verdict or entering judgment *n.o.v.*" *Id.*

Moreover, the above principles have particular application where, as in this case, the party's request for a new trial is based, in part, on improper conduct and argument presented by opposing counsel. "The effect of counsel's remarks in the setting in which they were made, could more accurately be appraised by the trial judge than the appellate court." *Panelle v. Chicago Transit Authority*, 31 Ill.2d 560, 562, 202 N.E.2d 484 (1964). As this principle was restated by the Appellate Court in two later decisions:

> Generally, the allowance or refusal of a motion for a new trial is within the discretion of the trial judge because in passing on the motion he has the benefit of his previous observation of the participants, their manner of speaking, and the circumstances aiding in the determination of credibility. This deference given a trial judge by courts of review *is no where more justified than when applied to a question of prejudicial conduct of counsel before a jury. The trial judge is in a much better position to determine the prejudicial effect of counsel's conduct [than a reviewing court].*

Harrison v. Chicago Transit Authority, 48 Ill. App. 3d 564, 566, 363 N.E.2d 81(1st Dist. 1977) (emphasis supplied).

[6]

> Further, we must emphasize the distinction between the trial court's discretion in granting a new trial and the appellate court's more limited power of review. It is true that both the trial court and the appellate court owe great deference to a jury's determination of contested factual issues. As stated in *Torrez v. Raag*, "jury determinations can be set aside only when the trial court is clearly satisfied that they were occasioned by passion or prejudice or were found to be wholly unwarranted from the manifest weight of the evidence." Consequently, when a post-trial motion for a new trial is made, on the grounds of trial error, the trial judge must determine from his own observation, whether the verdict was tainted by a passion or prejudice." The appellate court in reviewing a decision, must not reverse it absent a clear abuse of discretion, affirmatively shown. While there must be "some error" occurring in the record as the grounds for a new trial, the trial court is in a superior position to weigh the affect of such error on the jury. Therefore, in reviewing the record and the briefs of counsel, we must accord proper deference to the trial court's assessment of the errors.

Kolakowski v. Voris, 94 Ill. App. 3d 404, 409-410, 418 N.E.2d 1003 (1st Dist. 1981) (citations omitted).

In this case now before the Court, Plaintiff asks this court to set aside the jury's verdict and order a new trial. As will be established *infra*, "substantial justice was [not] accomplished" in this case. There

were numerous instances of prejudicial comments and attorney misconduct that were so continuous and egregious that Plaintiff was denied her right to a fair trial and the verdict of the jury is forever tainted by passion and prejudice. Furthermore, the jury's verdict in favor of Defendant and against Plaintiff was contrary to the manifest weight of the evidence and should be set aside by this Court.

In asking for a new trial on these bases, Plaintiff does not ask this Court to assume the constitutional prerogatives of the jury. Instead, Plaintiff respectfully submits that the continual misconduct by Defendants' attorney denied Plaintiff a fair trial and led to a resolution by this jury that was so "unreasonable, arbitrary and unsupported by the evidence" that a new trial is not only warranted in this instance, but is required. [7]

ARGUMENT

I. Plaintiff Was Denied A Fair Trial As A Result of Numerous Instances Of Prejudicial Comments And Misconduct By Attorneys For Defendants.

From the very outset of the trial, counsel for the Defendants embarked upon a course of misconduct designed to obfuscate the issues and prejudice the Plaintiff and her attorneys in the minds of the jurors. The deliberate misconduct continued unmitigated throughout the presentation of witnesses all the way through to the closing arguments. Unfortunately, the atmosphere created by the Defendants' attorneys' misconduct is not adequately reflected in the cold, written record, since court reporters have no language to record tonal inflections, decibel levels, body lan-

guage, facial grimaces and bullying mannerisms. Although the transcripts cannot capture each such instance, this Court was a witness to the attorneys' conduct in this trial — the specific acts as well as the cumulative effect. As such, this Court may take judicial notice of this conduct, which was a substantial factor in this miscarriage of justice.

Generally, improper argument or misconduct of counsel can be a sufficient basis to require a new trial. *Mykytiuk v. Stamm*, 196 Ill. App. 3d 928, 936, 554 N.E.2d 505 (1990). A case that is on point and instructive to the issues presented in this motion is *Rutledge v. St. Anne's Hospital*, 230 Ill. App. 3d 786, 595 N.E.2d 1165, 1168 (1st Dist. 1992). In *Rutledge*, the plaintiff appealed a verdict in favor of a defendant hospital on the basis of numerous instances of prejudicial and improper arguments and other misconduct by the attorney for the defendant. Among some of the defendant's transgressions were arguing the nonjoinder of potential parties, violating a pretrial motion *in limine*, implying that the plaintiff was hiding evidence by not calling a witness and distorting and misrepresenting facts in order to mislead the jury. The Appellate [8] Court reversed the verdict for the defendant and remanded the case for retrial based upon the misconduct of the attorney for the defendant. The court recognized that some of the transgressions, standing alone, would not serve to form the basis for a new trial, however, when looked at together each instance of misconduct contributed to a cumulative prejudice against plaintiff caused by defense counsel over the course of the trial." 230 Ill. App. 3d 786, 595 N.E.2d 1168, 1170. Specifically, the Court stated:

> [O]ur determination here is predicated on the weight of prejudice cumulatively applied by

> defense counsel's actions. We note that throughout the record, not only in the passages cited in this opinion, counsel's conduct, both in chambers and in front of the jury, too often goes beyond the margin of zealous advocacy to become acrimonious, overly contentious, and unswervingly determined to persuade the jury that plaintiff is attempting to conceal evidence without any evidentiary foundation.
>
> The fact that this inflammatory disposition survives to become apparent in the record only supports our finding that the jury's decision was prejudiced by her actions and that plaintiff was denied a fair trial.

Id. at 1171.

In this case, there were numerous instances of misconduct that went far "beyond the margin of zealous advocacy." "Acrimonious" and "overly contentious" are mild descriptions of the behavior and conduct displayed by Defendant's counsel throughout the two weeks this matter was on trial. For that reason, this motion is lengthy, as it attempts to address Plaintiff's grievances with direct quotations from the written transcript. Similar to *Rutledge*, some of the transgressions, when looked at individually, would not alone warrant a new trial; however, the cumulative effect of the foregoing misconduct and prejudicial comments was overwhelming and served to deny this disabled minor a fair trial.

[34]

E. Plaintiff Was Prejudiced By The Continuous Unfounded Accusations By Defendants' Counsel That He Was The Victim Of Wrongdoing And Unfair Treatment By Both Plaintiff's Counsel And This Court.

The tone of hostility and contempt displayed by Defendants' attorneys was not limited to the examinations of witnesses in the courtroom, but also extended to the interactions with Plaintiff's attorneys and this Court during sidebar conferences in the hallway just outside of the courtroom. On numerous occasions the Court had to request that Defendant's attorney lower his voice so that the jury would not hear his arguments. In particular, the words "improper" and "inappropriate" were always stated in a loud voice, as quickly as possible, before the door to the courtroom closed and before the court reporter had time to set up in the hallway to begin her transcription. On one particular occasion, the Court literally had to rush to the door to close it himself because Defendants' attorney could not contain his diatribe until the court reporter was in the hallway to record the proceedings. Obviously, given this deliberate tactic, all of the prejudicial comments and accusations leveled by Defendants' attorney were not recorded in the transcript, but this Honorable Court personally witnessed that behavior and was personally accused of wrongdoing on more than one occasion, and will likely not soon forget the charged atmosphere created by this misconduct.

A particularly memorable instance of this type of outrageous misconduct that is found in the written transcript includes a direct attack by Defendants' counsel on the integrity and fairness of this Court. During the testimony of Thomas Walsh, Defendants

economic expert, counsel for Defendants strategically requested a sidebar conference **[35]** in order to stop the flow of the cross-examination.[6] In the hallway outside the courtroom, Counsel then launched into a histrionic display of feigned indignation, loudly accusing the Court of unfair treatment:

> THE COURT: All Right.
>
> MR. MANNION: I would like to put on the record **things should go both ways**. Mr. Siegel did not answer one of my questions. Now this witness isn't even allowed to explain anything. He's cut off. The jury is told to strike it. You're yelling at this witness. This is preposterous.
>
> MR. CURCIO: As you are yelling here outside the courtroom.
>
> MR. MANNION: This is improper.
>
> THE COURT: Settle down right now. Keep your voices down....

(Tr., 4/29/04, 1:30 p.m., attached hereto as Exhibit F, at 56, emphasis supplied.) This heated interaction continued with counsel for Defendant loudly proclaiming "[T]here is apparently different rules for our witness versus the plaintiff's witness," (*id.* at 56), and I would think the same rules should apply to both witnesses." (*Id.*)

Offended by such an outrageous display of disrespect for the office of this Honorable Court, counsel for Plaintiff put on the record his distaste for the lack of

---

[6] At this point in the examination, Defendants' expert had been challenged on representations made in his C.V. regarding his teaching credentials at Georgetown University which were not supported by that schools records or Staff Directory. Put simply, the objection and request for a sidebar was a ruse.

professionalism and decorum employed by Defendants' counsel. Incredibly, counsel for Defendant later denied the impropriety of these comments:

> MR. MANNION: If Siegel was allowed to run on and this witness can't get a word in edgewise, apparently it's okay for Mr. Curcio to cut off a witness and it's supported by you, but if we try to do that it's not, and I don't think it's right.
>
> MR. CURCIO: Your Honor, these comments are unprofessional and they are a direct attack on the office that you occupy. **[36]**
>
> MR. MANNION: No, they're not.
>
> MR. CURCIO: Yes, they are.
>
> THE COURT: They surely are.

(*Id.* at 57.)

There is no question that the foregoing comments by Defense counsel were indeed a direct attack on the office occupied by this Court. Unfounded allegations such as these have absolutely no place whatsoever in the trial of a lawsuit. The fact that counsel for the defendant can boldly proclaim otherwise is an indication that (a) he was so out of control that he was completely unaware of what he was saying, which is very unlikely, or (b) like John McEnroe or Bobby Knight, these outbursts and feigned accusations of mistreatment are a highly calculated tactic in this attorney's "advocacy," attempting to extort greater leeway with the Court as the trail progresses.[7]

---

[7] It must be noted that lead Defense counsel is an Ohio attorney who was admitted *pro hac vice* to try this case after Defendant's pervious trial counsel, John Patton, unsuccessfully attempted to continue to the trial last minute, citing a conflict a Wisconsin trial and a personal vacation. The tact that this particular attorney

Unfortunately, throughout this trial, counsel's loud accusations of improper conduct were not limited to criticisms of the Court, but also included direct attacks on the professionalism and conduct of Plaintiffs attorneys and witnesses. According to Defense counsel's performance, everyone was out to get him and his client; therefore, he granted himself license to win at all costs, no matter what was said or who was accused. Sadly, the dark shadow cast by this paranoia, whether real or acted, reached far and wide, and ultimately served to prejudice Plaintiff's right to a fair trial.

A particularly egregious example of this behavior was found on the very first day of trial, during the cross-examination of an independent eyewitness, Mrs. Willie Ann **[37]** Hagler. Prior to trial, Mrs. Hagler had given statements to investigators for both Plaintiff and Defendants. On cross- examination, Mrs. Hagler admitted that when discussing the incident with Defendants investigator, she had described the girl's actions to him as a run. The purpose of counsel's question in this regard was to point out that the witness had chosen the descriptive word "run" and was not led to use that word by Defendants' investigator, a point that she readily conceded to counsel. Despite her truthful answer to this question, counsel still attempted to impeach her as if she had not conceded his point on the witness stand. Counsel further attempted to undermine her credibility by improperly announcing to the jury, in dramatic fashion, the existence of a tape

---

need not concern himself with his professional reputation in this jurisdiction proved liberating for his style of trial advocacy. As is unfortunately the case with such admissions, the probability that this attorney would ever appear again before this Court again is extremely low.

which he intended on playing. (*See* Tr., 4/23/04, 1:30 p.m., Ex. E, at 139.)

Because there was no foundation for impeachment, or a need to refresh the recollection of the witness, Plaintiff's counsel objected to any use of the tape, Instead of seeking a ruling outside the presence of the jury, Defendants' attorney then attempted to announce to the jury the contents of the tape, and its relation to prior deposition testimony, under the guise of arguing his legal position to the Court regarding the objection, thereby forcing Plaintiff's counsel to quickly request a side bar in order to stop counsel's improper speech publicizing the details of non-admitted, disputed evidence.

As the court reporter was transferring her equipment from the courtroom to the hallway, and before the door to the courtroom was closed, Defendant's attorney began yelling at the top of his voice "**This is IMPROPER, IMPROPER!**" His uncontrolled diatribe continued as he proceeded down the hallway to the location chosen by the Court for sidebar conferences. Counsel's yelling at this point was so loud and disruptive that Plaintiff's attorney was unfortunately compelled to gesture and whisper to **[38]** Defendants' counsel to "shut up."[8] At that time, the court interceded and told counsel to calm down. Counsel's outburst occurred prior to the court reporter setting up her equipment and therefore is not included in the written transcript. However, the following exchange was transcribed and is representative of the pattern of disrespect, disdain and belittling behavior Defendant's

---

[8] This was an admittedly poor choice of words but under the circumstances was the only effective means of communication with counsel while he was still in mid-tantrum.

counsel exhibited towards Plaintiff's attorneys and the Court:

> THE COURT: We are outside the presence of the jury. For what purpose do you want to play the tape?
>
> MR. MANNION: To show it was in no way any type of leading question that brought this out. He brings out in his direct examination, **absolutely improper** to do —
>
> THE COURT: Keep it down.
>
> MR. MANNION: Absolutely improper to do, trying to make it seem like the investigator led her. It was her words run. They got to these witnesses. **They tampered with the witnesses and I resent it.**

(Tr., 4/23/04, 1:30 p.m., Ex. E, at 140.) As stated earlier, the written transcript does not adequately convey the explosive and vitriolic manner in which counsel addressed the Court and Plaintiff's attorneys.

Later in this same exchange, Plaintiff's counsel was attempting to correctly point out to the Court that Mrs. Hagler had answered the question posed to her in such a manner that counsel's efforts at discrediting her were not impeaching, when counsel exploded with the following accusation: "The fact that you can coach witnesses and change their testimony." (*id.* at 142) Once again, the Court intervened in order to stop the personal attacks and histrionic responses of counsel for Defendant. After this outrageous display of disrespect and attempted intimidation, the sidebar concluded with **[39]** the Court reminding counsel for Defendant the roles of the Court and attorneys in a trial in his courtroom: that the Court decides what happens at trial, not Defendants' counsel. (*Id.*) The Court further

implored Defendants' counsel to not let the matter get out of hand and turn into a "circus."[9] (*Id.*)

Defendants' "McEnroe/Knight' strategy of casting themselves as the victim of wrongdoing and unfair treatment continued throughout the remainder of this trial. The multiple accusations of improper conduct leveled at Plaintiff's attorneys and the claims of unfair treatment leveled at the Court were clearly audible to the jury. On numerous occasions, the Court had to take the unusual remedy of relocating the jury to the jury room in order to rule on a simple evidentiary issue. Vocal guffaws, histrionic eye rolls, and distracting body language were common place throughout Plaintiff's attempts to conduct examinations of her witnesses. All of these improper actions were designed with one goal in mind: to prejudice Plaintiff and her attorneys in the minds of the jury and taint the proceedings and the outcome with passion and sympathy.

* * *

[67]

CONCLUSION

The foregoing examples amount to the trial equivalent of the proverbial frog in the pot slowly brought to boil. While some specific instances of counsel's misconduct were outrageous, each one in isolation did not rob the Plaintiff of her fair trial. However, taken as a whole the gradual and cumulative effect of the miscon-

---

[9] Unfortunately, this request by the Court would be repeated throughout the trial. On more than one occasion, the Court warned Defendants' attorneys to not make him mad. As stated earlier, the Court's temperament and patience in handling these tactics was exceptional, however, it was ultimately exploited by Defendants' counsel in his efforts to continue pushing the envelope.

duct left this Court and the Plaintiff with a result as contrary to the concept of a fair trial as any single error worthy of an immediate mistrial. Although a trial should be the result of our adversarial system, the Plaintiff is entitled to have a jury hear the case free form fabricated evidence, false innuendo, and courtroom antics intent on prejudicing the jury against Plaintiff and her counsel. And though Plaintiff also cites errors in the court's instructions, by the time the jury was instructed, no information provided to the jurors could revive the dead frog in the pot.

According to the our *Appellate Court in Los Amigos Supermarket v. Metropolitan Bank and Trust Co.*, 306, Ill. App. 3d 115, 713 N.E.2d 686 (1st Dist. 1999), this Court must answer three questions: (1) Was this a close case for which the jury could have **[68]** decided either way? (2) Were there substantial errors in this case? and (3) Might have those errors tipped the scales in favor of the successful party? *Id.* at 129, 713 N.E.2d at 696. If those questions are answered in the affirmative. as they are in this case, the situation mandates a new trial. *Id.*

The specific misconduct in the examination tactics and closing argument in the *Los Amigos* case is uncannily similar to the present case:

> Although counsel is allowed to draw all reasonable inferences from the evidence during closing arguments, [he] is not permitted to misrepresent the evidence, argue facts not in evidence, or "create [his] own evidence." While [opposing counsel] did not object to counsel's comments during closing argument, waiver generally does not result where the comments were so inflammatory or prejudicial as to deny a party a fair trial.

> We cannot say that counsel's questions and closing argument did not affect the outcome of the case. This was a close case which turned for the most part on witness credibility. The unsupported innuendo by Avina's counsel could have tarnished Rodriquez's credibility. . . . We must reverse the trial court's judgment and remand for a new trial.

Id. (citations omitted). Likewise, for all of the reasons stated herein, Plaintiff respectfully requests this Court allow the minor Plaintiff, Roe Ann Lockhart, to have the fair trial to which she is entitled. Notwithstanding the efforts of this Court and her counsel to afford her one, she did not receive one before this recent jury.

Respectfully submitted,

JOSEPH R. CURCIO, LTD.
Attorneys for Plaintiff
161 N. Clark Street, Suite 2550
Chicago, IL 60601
312-321-1111

APPENDIX B

No. 07-487
In the
Appellate Court of Illinois
First Judicial District

U.S. BANK, as Trustee of the ROE ANN LOCKHART OBRA '93 TRUST, and the ROE ANN LOCKHART OBRA '93 TRUST, formerly U.S. Bank, as Guardian and Representative of the ESTATE OF ROE ANN LOCKHART, a disabled minor,

Plaintiff-Appellees,

v.

YMCA OF METROPOLITAN CHICAGO, a corporation, TERRELL C. SANDERSON, as a duly authorized agent, servant and employee of The YMCA OF METROPOLITAN CHICAGO, a corporation,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS YMCA OF METROPOLITAN CHICAGO AND TERRELL C. SANDERSON

[8]

ISSUES PRESENTED FOR REVIEW

Issue Re: The First Trial

1. Whether a trial court may keep secret multiple improper, unverified *exparte* communications between itself, its sheriff and the jury during trial, and then later — after a defense verdict and after a court-ordered post-verdict mediation fails to settle the case

for plaintiff — use those improper and unverifiable *ex parte* communications as the sole basis to impeach the jury verdict and to award plaintiff a new trial.

* * *

[27]

ARGUMENT RE: THE FIRST TRIAL

I. THE TRIAL COURT CANNOT IMPEACH THE VERDICT AND AWARD A NEW TRIAL BASED ON WHOLLY UNSUBSTANTIATED, ILLICIT, *EX PARTE* JURY COMMUNICATIONS.

A. Standard Of Review

When a trial court's exercise of its discretion — awarding a new trial — is based on an erroneous conclusion of law, appellate review is *de novo*. *Beehn v. Eppard*, 321 Ill. App. 3d 677, 747 N.E.2d 1010, 1013 (1st Dist. 2001); *Hall v. Chicago & N. W. Ry. Co.*, [28] 349 Ill. App. 175, 110 N.E.2d 654,658 (1st Dist. 1953). In *Hall* for example, the trial court granted plaintiff a new trial for one stated reason: defendant's closing argument that plaintiffs recovery was not subject to income tax. The appellate court held that whether the jury could be apprised that a recovery was not subject to income tax involved a question of law. Accordingly, the court was not confined by the abuse of discretion standard in reviewing whether the order granting a new trial was proper:

> [T]he trial judge was not called upon to exercise his discretion in determining whether the verdict was against the manifest weight of the evidence or determining the credibility of witnesses; his discretion was apparently exer-

> cised *in favor of defendant* on all matters raised in the motion for a new trial with the exception of the propriety of counsel's argument to the jury as to income tax. The crucial question presented in defendant's petition is whether the trial court erred *as a matter of law* in granting a new trial. The court had no discretion in deciding that question; the solution must be based on a consideration of the law rather than on the more general issue of the limits of judicial discretion. 110 N.E.2d at 658 (emphasis in original).

Hall's reasoning applies here. The trial court's discretion was apparently exercised *in favor of defendant* YMCA on all matters raised in the motions for a new trial with the exception of one that the court raised on its own: alleged prejudice supported solely by secret, ex parte juror communications. Like *Hall*, this appeal presents an issue of law to this Court: whether, as a matter of law, a trial court can award a new trial based on unverifiable prejudicial statements, allegedly uncovered during secret, *ex parte* [29] communications between the court staff and jury. The question raised is not whether the finding of prejudice is supported by the record — the trial court conceded that it was not — because the finding is supported only by secret, *ex parte* juror communications. Thus, there is no discretion to review, meaning that this Court is not constrained by the abuse of discretion standard of review. Instead, review is *de novo*.

Even if an abuse of discretion standard applies, that discretion was abused here. The trial court can not substitute its judgment for that of the jury by granting a new trial where the evidence supports the verdict and it does not appear the moving party was

denied a fair trial. *Lagoni v. Holiday Inn Midway*, 262 Ill. App. 3d 1020, 635 N.E.2d 622, 628 (1st Dist. 1994).

B. It Is Reversible Error To Grant A New Trial Based On A Secret, Extrajudicial Investigation That Deprives A Party Of Its Due Process Rights To A Fair And Open Proceeding.

It is reversible error to grant a new trial based on a court's secret, extrajudicial investigation. *People v. Rivers*, 410 Ill. 410, 102 N.E.2d 303 (1951); *Takecare v. Loeser*, 113 Ill. App. 2d 149, 251 N.E.2d 724 (1st Dist. 1969); *Loucks v. Pierce*, 341 Ill. App. 253, 93 N.E.2d 372 (4th Dist. 1950).

In *Loucks*, the jury returned a defense verdict. Plaintiff moved for a new trial based on claims of juror irregularities, including claims that the bailiff waited ten minutes before discharging the jury past the trial court's predetermined time to declare a mistrial so that the jury could reach a verdict; that the bailiff provided the jury with the definition of a word at the jury's request; and that a juror's verdict was the result of improper arguments by other jurors during deliberations. 93 N.E.2d at 374-76. The court ordered a new trial after undertaking a private investigation of the alleged irregularities by interrogating court personnel. *Id.* at 374. Evidence of the court's investigation did not **[30]** appear in the record. *Id.* It appeared that the court's decision was based, in part, on hearsay as opposed to credible facts. *Id.*

The appellate court reversed, holding that it is error to grant a new trial based on a judge's private, extrajudicial investigation:

> If the trial court based the allowance of the new trial upon his own extra-judicial investiga-

> tion, it must be held error. The rights of litigants in a court of record cannot be left to the mercy of private remarks in the judge's ear. 93 N.E.2d at 374.

The court reversed the new trial order because the right to appellate review is nullified if the order is based on secret evidence:

> The right [to discretionary review of a new trial order] would be nullified if the order is based on evidence heard outside of court, and not preserved in the report of proceedings. 93 N.E.2d at 374.

Loucks remanded the case for an evidentiary hearing so that the trial court could consider for the first time whether plaintiff was prejudiced by the alleged irregularities, the only relevant inquiry justifying a new trial. *Id.* at 376-77. The appellate court established the standard for determining prejudice: the trial court had to find that the verdict would have been different but for the irregularities. Id. at 376.

Loucks makes clear that a new trial cannot be awarded for irregularities not impacting the verdict. Where the verdict is just and supported by the evidence, no new trial is warranted. *Id.* Additionally, this finding of prejudice has to be based on credible facts, not hearsay. *Id.* at 377. **[31]**

In *Takecare*, the trial court changed a judgment after engaging in *ex parte* communications with several jurors after the verdict had been rendered and the jurors had been discharged. The court claimed the changed judgment reflected the "real intention of the jury." 251 N.E.2d at 725. The appellate court reinstated the verdict and remanded the case with directions to enter judgment on the verdict, stating:

> [T]he court entered judgment for defendant contrary to the verdict because of a conversation he had with jurors after the verdict had been rendered and after the jury had been discharged. This conversation resulting as it did in the entry of the judgment amounted to a private extrajudicial investigation and clearly was erroneous. *Id.* at 726.

Finally, in *Rivers*, the appellate court explained that a trial court's extrajudicial investigation deprives a party of its due process rights to a fair and open proceeding:

> However innocently any private investigation may have been made, for whatever purpose, and regardless of its results, the defendants' constitutional right to have everything considered against them produced in open court has been violated. 102 N.E.2d at 308.

Loucks, *Takecare* and *Rivers* are dispositive. Here, the trial court's order awarding plaintiff a new trial is based on hearsay obtained through the court's secret, extrajudicial investigation of matters entirely outside the record: jurors allegedly overhearing Mr. Mannion's sidebar comments. Such hearsay cannot be used to impeach the verdict. As *Loucks* noted, the court's order constitutes reversible error as a matter of law because it is unsubstantiated and essentially unreviewable. **[32]**

Like *Takecare*, defendants are entitled to entry of judgment in accordance with the verdict. And unlike *Loucks*, there is no reason to remand this case to consider whether there was a probability of a different result on retrial. The trial court has already made that determination, finding that it was not probable — or

even more likely than not — that the alleged misconduct affected the verdict. The court stated: "The outcome, the verdicts could have, might have been the same." (V. 30, Tr. 25)

The court's determination that the verdict would likely have been the same, regardless of Mr. Mannion's alleged "outbursts," is confirmed by the record. Roe Ann ran onto the highway outside the crosswalk and directly into the path of Sanderson's vehicle, which was traveling well below the posted speed limit. A defense verdict was mandated under the evidence, and was a foregone conclusion after the two eyewitnesses, Bolden-Blocker and Hagler, were impeached when they recanted and changed significant portions of their testimony under questioning by plaintiff's counsel. (V. 23, Tr. 41, 91, 106, 150; V. 24, Tr. 58-59, 72, 78-80, 101, 113, 115-116; V. 27, Tr. 241-42, 245-46; V. 30, Tr. 25)

Plainly, any prejudice to plaintiff was the result of Hagler's ultimate admission that Roe Ann entered the roadway in a "split second" in front of the van, and Hagler's candid revelation that she believed plaintiffs investigator had attempted to influence her observations because he kept going back to the fact that the girl had "almost died." (V. 24, Tr. 109-10, 112) Further, plaintiffs own expert witness conceded that Roe Ann's movement onto the road took 2/3 to 3/4 of a second, leaving a driver no time to react given that the standard reaction perception time is 1.5 to 2 seconds or even longer. (V. 27, Tr. 12-14) **[33]**

Simply stated, the defense verdict is just and the only verdict allowable under the evidence of this case. Thus, this case must be remanded with directions to reinstate the jury verdict for defendants.

C. The Court Cannot Unilaterally Amend The Record Months After Trial To Reflect Its Purported Memory Of Events.

A trial court cannot augment the record with its "clear memory" of facts that contradict the clear and unambiguous contents of the record. *Hartgraves v. Don Cartage Co.*, 63 Ill. 2d 425, 348 N.E.2d 457, 461 (1976). In *Hartgraves*, a juror was injured and could not continue with trial. There was an in-chambers, off-the-record discussion in which plaintiff contended that defendant had consented to proceed with fewer than twelve jurors. Thereafter, defendant moved for a mistrial in open court, as reflected in the trial transcript. The court denied the motion and the case proceeded with eleven jurors. 348 N.E.2d at 458.

After the jury found for plaintiff defendant filed a posttrial motion alleging denial of its constitutional right to a jury of twelve. At the hearing on the post--trial motion, six months after trial, the judge stated that he had a "clear recollection" of the in-chambers discussion and that defendant had waived its right to a jury of twelve. The court denied the post-trial motion and defendant appealed. *Id.*

The appellate court reversed and the Supreme Court affirmed that decision. The high court held that the judge's recollection of events was not part of the record:

> [A]ny corrections of or additions to the record which contradict the clear and unambiguous contents of the record must be supported by something other than the "clear memory" of the trial judge. *Id.* at 461.

[34]

The court also held that if defendant had actually agreed to waive its right to a jury of twelve, contrary to what the record clearly showed, then it was incumbent on the judge and plaintiffs counsel to insure that the record reflected this fact:

> Further, it is incumbent on the judge and opposing counsel to insure that the record reflects any off-the-record agreements by which [a party] contradicts [its] on-the-record position. *Id.*

The court noted that there were no documents or minutes confirming defendant's alleged waiver; that the judge had relied solely on his "clear memory" of events; and that the transcript clearly reflected that defendant had not waived its right to a jury of twelve. *Id.* at 459.

Hartgraves applies with equal force in this case. Here, the court attempted to shore up its ruling by augmenting the record with its recollection of events occurring months earlier, in precisely the manner *Hartgraves* prohibits. As in *Hartgraves*, the court's purported memory of juror complaints about defense counsel's conduct, unsubstantiated by any evidence, is not part of the record.

The court's contention that the transcript does not reflect these events because they purportedly occurred before the court reporter could transcribe them is of no moment. (A.4-5) If in fact the alleged events occurred, *Hartgraves* dictates that it was incumbent on the trial court to insure that they were reflected in the record. This, the court did not do, Thus, the court's recollection is not part of the record and does not support its ruling granting a new trial.

Also like *Hartgraves*, the court's asserted memory of off-the-record events directly contradicts its stated procedure of putting all juror issues in writing: "I usually put **[35]** everything in writing." (V. 29, Tr. 42) Indeed, the record reflects that the court always followed its stated procedure when confronted with juror communications, however minor. The court made a record when jurors communicated to the sheriff about disruptive observers, and when a juror communicated to the sheriff about a personal scheduling issue. (V. 24, Tr. 147-48, V. 29, Tr. 41-42)

If, during the first trial, as the trial court stated, matters came to its attention via *ex parte* juror communications about the jury allegedly overhearing comments, the trial court should have *voir dired* the jury in counsels' presence. On this issue, defendants cite no less an authority than Robert A. Clifford, plaintiffs counsel in the second trial. During the second trial, defendant objected and moved for a mistrial based on a claim that Roe Ann made an outburst during opening statements that was overheard by the jury. Mr. Clifford stated, "I want the jury *voir dired* about whether or not they heard anything." (V. 32, Tr. 174-75)

The court always made a point of going on the record to report, and then redress, any juror communications. The fact that the court did *not* follow its stated procedure of going on the record to redress any of the alleged "several occasions" when jurors purportedly communicated such an alleged significant claim that they were overhearing defense counsel's sidebar comments, and allowing the jury to be *voir dired* in counsels' presence about whether or not they heard anything, is most telling.

In sum, Hartgraves mandates reversal. The court's *ipse dixit* — that plaintiff was prejudiced merely because the court said so — with no identification of the allegedly prejudicial comments allegedly overheard by the jury is not evidence and cannot be used to impeach the verdict. **[36]**

D. Canon 3(A)(4) Of The Code Of Judicial Conduct Forbids A Court From "Considering Ex Parte Communications."

There is an additional reason the court's decision to order a new trial withers under scrutiny. Canon 3(A)(4) of the Code of Judicial Conduct forbids a judge to "permit" or "consider" *ex parte* communications:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communica-tions, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . . Code of Judicial Conduct, Canon 3(A)(4).

It is improper not only for a judge to permit ex parte communications, but to fail to disclose them. *In re Marriage of Wheatley*, 297 Ill. App. 3d 854, 697 N.E.2d 938, 941 (5th Dist. 1998) (holding that judge's receipt of *ex parte* communications and failure to disclose this fact until announcement of his ruling created the appearance of impropriety).

For these reasons, the court should not have permitted the juror communications even to occur, much less relied on them to impeach the verdict. Canon 3(A)(4) expressly

prohibits precisely what happened here. And the court permitted *ex parte* communications on not one but, by its own admission, "several" occasions. The court did not disclose the illicit communications until ten months after trial, thereby denying the parties an opportunity to explore any claims of prejudice. The court then improperly considered the illicit communications in ordering a new trial. In short, the court compounded its error at every turn. **[37]**

E. The Sole Basis For The Court's Ruling Is Thoroughly Belied By The Record The Court Explicitly Acknowledged That Zealous Advocacy Is Not Misconduct.

The validity of the court's reasons for ordering a new trial is eroded by the court's own on-the-record statements The court explicitly acknowledged that the purportedly objectionable behavior was nothing more than zealous advocacy under the circumstances — not prejudicial misconduct. Such vigorous trial advocacy is not grounds for a new trial *Suen v. Greene*, 947 S.W.2d 791, 795 (Ark. 1997) (holding that grant of a new trial based on defense attorney's frequent sidebar comments was a manifest abuse of discretion where record indicated that counsel for both parties were vigorously advocating their clients' interests, court maintained control over the proceedings, and no reasonable possibility of prejudice existed). (A. 82)

The court explicitly acknowledged that arguments between attorneys are commonplace in emotionally-fraught, high-stakes litigation. Indeed, the court went so far as to observe that in its personal experience as both attorney and judge, raised voices occur in *every* such case :

> This is a very, very serious case . . . . Every case I've ever been involved in as an attorney, as a judge, especially when the stakes are this high, we have blowups. We have frustrations. We have emotions. We have outbreaks. It happens because of the emotion. (V. 27, Tr. 234)

The court's statements are fundamentally at odds with its conclusion that such commonplace behavior merits a new trial. The court's ruling is even more indefensible insofar as it singles out Mr. Mannion. The record reflects the court also admonished plaintiff's counsel, and not just Mr. Mannion:
[38]

> *Both* of you are complaining about each other's conduct, and you're *both* doing it. (V. 27, Tr. 209, emphasis supplied)
>
> * * *
>
> I don't appreciate the argument back and forth when both sides are doing what they're complaining the other side is doing. (V. 27, Tr. 234, emphasis supplied)

The conduct to which the court took exception is simply the sort of zealous advocacy often displayed in high-stakes, high-emotion litigation. If contentious attorney exchanges during the heat of trial were sufficient to justify granting a new trial, every verdict would be endangered.

F. The Alleged Objectionable Conduct Did Not Prejudice Plaintiff: The Raised Voices Occurred Outside The Jury's Presence.

Even assuming defense counsel's alleged raised voice at sidebars can be characterized as "misconduct," there is still no basis for awarding a new trial. Under the evidence presented, the jury could have only rendered a verdict for defendants. Thus, plaintiff cannot establish prejudice.

Moreover, counsel's conduct occurred entirely outside the presence of the jury. (V. 24, Tr. 116-22, V. 27, Tr. 208-13) Accordingly, the court exceeded its authority in impeaching the verdict: "[T]he mere presence of error where not shown to be prejudicial cannot be allowed to vest the trial court with the power to substitute its judgment for that of the jury." *Lagoni*, 635 N.E.2d at 634.

Again, the record is clear on this point. The only two conceivable "loud side bar comments" by defense counsel — one after Hagler recanted her previous statements on the stand and the other during Mr. Curcio's unnecessarily hostile treatment of a defense **[39]** witness — occurred *"outside the presence of the jury,"* as reflected in the transcripts. (V. 24, Tr. 117-22; V. 27, Tr. 208-13; emphasis supplied) Simply put, plaintiff could not have been prejudiced by what the jury did not witness or hear.

G. The Court Engaged In Double Speculation In Concluding That Plaintiff Was Prejudiced.

The court's order granting a new trial is fatally flawed for another reason. The court employed double speculation to reach the conclusion that "the comments off the record that the jurors heard were very prejudi-

cial to the Plaintiff." (V. 30, Tr. 24) There is no record evidence the jury overheard anything at all, much less that the jury was thereby prejudiced against plaintiff. Thus, the court's finding is but surmise built on conjecture. Such a shaky foundation cannot sustain the court's order. *Ferman v. Estwing Mfg. Co.*, 31 Ill.App.3d 229, 334, N.E.2d 171, 175 (1st Dist. 1975) ("the granting of a new trial on the basis of mere speculation that a single juror's mannerisms indicated prejudice toward plaintiff constituted a clear abuse of discretion").

H. The Court Did Not Consider Mr. Mannion's Allegedly "Loud Comments" Or Conduct Sufficiently Prejudicial To Take Corrective Action During Trial.

The court's decision to order a new trial is further undermined by its own management of the proceedings. More specifically, by what the court did *not* do. Whatever the court's apprehensions about Mr. Mannion's conduct, they certainly were not sufficient to prompt the court to declare a mistrial and refuse to submit the case to the jury. Certainly, if a court is seriously concerned about misconduct, it has the authority to declare a mistrial. *Ferman*, 334 N.E.2d at 174. The court's failure to do so, or to take any other corrective action, leads to but one conclusion: either no misconduct occurred or the court did not find the alleged misconduct prejudicial. **[40]**

I. Plaintiff Waived Any Challenge To The Claimed "Multiple" Incidents Of Misconduct: Plaintiff Did Not Once Object Or Move For A Mistrial.

There is an additional and independent reason the court erred in granting plaintiffs request for a new trial. The sole basis for the court's grant of a new trial was Mr. Mannion's "off the record comments" purposely made for the jury to hear. (V. 30, Tr. 22-26) While plaintiff's post-trial motion asserts that defense counsel's sidebar objections made in a "loud voice" were clearly audible to the jury, the motion concedes that no objections were made to this alleged behavior, which is admittedly "not reflected" in the record. (R. C4185) Even if that were so, once the court reporter was set up, plaintiff's counsel should have then made a record if he deemed such comments objectionable.

It is axiomatic that the proper procedure to be employed in making a trial record is an objection so the court can conduct a hearing, rule and, if necessary, give a limiting instruction. Failure to do so results in waiver of the claim of error on appeal. *Gillespie v. Chrysler Motors Co.* 135 Ill.2d 363, 553 N.E.2d 291, 297 (1990) (reversing an order grantmg a new trial and holding that the waiver doctrine must be strictly applied).

Plaintiff's failure to contemporaneously object deprived defendants of an opportunity to respond to plaintiff's posttrial assertions of prejudicial error. Defendants were deprived of their right to respond to plaintiff's accusations or to have the jury polled to ascertain whether the jury had heard any alleged "off the record comments."

In short, plaintiff must be deemed to have drawn the same conclusion that the trial court drew during

trial: either defense counsel's conduct was mere advocacy and not prejudicial misconduct, or that an objection would not be made as a matter of trial strategy. Thus, plaintiff cannot now obtain a new trial for conduct deemed acceptable and unobjectionable at the time. *Bauer v. Timucci*, 33 Ill.App.3d 1051, 339 N.E.2d 434, **[41]** 439 (1st Dist. 1975) (holding that it was reversible error to grant a new trial on the basis of alleged misconduct where the complaining party failed to move for a mistrial).

J. A New Trial Awarded On The Basis Of Secret Information Does Not Serve — And, In Fact, Is Contrary To — The Ends Of Justice.

The court ordered a new trial based solely on alleged secret juror communications, as conveyed to the court by the sheriff, concerning jurors' reactions to defense counsel's alleged "off the record" sidebar comments. Simply put, the court's award of a new trial under these circumstances is contrary to every notion of justice recognized under Illinois jurisprudence.

The point was made over 140 years ago by the Illinois Supreme Court, which enunciated the following policy regarding Illinois trials:

> The policy of the law requires, that all the proceedings of the court should be open and notorious, and in the presence of the party, so that if he is not satisfied with it, he may take exceptions to it, in the mode pointed out by the law, and not be put to extraneous proof to show that an error has been committed in a secret proceeding, and, in fact, out of court. *Crabtree v. Hagenbaugh*, 23 Ill. 349, 1860 WL 6249, *1 (1860).

The court's order awarding a new trial is plainly contrary to this policy. The decision to grant a new trial must be based on matters of record, not alleged secret communications to a judge during trial kept hidden from the parties. A new trial awarded on the basis of secret information does not serve — and, in fact, is contrary to — the ends of justice. Thus, the court's order must be reversed and the defense verdict reinstated.

APPENDIX C

No. 07-487

IN THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

U.S. BANK, as Trustee of the ROE ANN LOCKHART OBRA '93 TRUST, and the ROE ANN LOCKHART OBRA '93 TRUST, formerly U.S. Bank as Guardian and Representative of the ESTATE OF ROE ANN LOCKHART, a disabled minor,

Plaintiff-Appellee,

v.

YMCA OF METROPOLITAN CHICAGO, a corporation, TERRELL C. SANDERSON, as a duly authorized agent, servant and employee of the YMCA OF METROPOLITAN CHICAGO, a corporation,

Defendants-Appellants.

PETITION FOR REHEARING

[1]

To The Honorable Justices of the Illinois Appellate Court:

Defendants, the YMCA OF METROPOLITAN CHICAGO, and TERRELL C. SANDERSON, respectfully submit that this Honorable Court overlooked and misapprehended the following points, necessitating further review and relief for defendants:

I.

THIS COURT'S OPINION HOLDING THAT JUDGE BURKE COULD KEEP SECRET THAT THE JURY ALLEGEDLY OVERHEARD SIDEBAR COMMENTS VIOLATES DEFENDANTS' RIGHTS TO DUE PROCESS.

Defendants'[1] rights to due process were violated by Judge Burke's decision and this Court's opinion continues to violate those rights by sanctioning conduct that is the antithesis of due process guaranteed to defendants by both the United States and Illinois Constitutions. U.S. Const. Amend. XIV, § 1 ; Ill. Const. Article I, § 2. The cornerstones of due process are "notice and an opportunity to be heard" — in other words a fair and open hearing. See *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). These due process rights are considered "essential." *Id.* This Court, however, has held it was permissible for Judge Burke to keep secret from defendants information that the trial court allegedly learned concerning something the jury allegedly overheard during trial and not reveal it to defendants until ten months after the verdict was rendered, depriving defendants of any meaningful way

---

[1] During the first trial, plaintiff never dismissed Terrell C. Sanderson from the case and the jury verdict in the first trial was rendered not only in favor of YMCA of Metropolitan Chicago but also Terrell C. Sanderson. R.C4135) Terrell C. Sanderson's rights in having the verdict in his favor reinstated are just as great as the YMCA of Metropolitan Chicago and Terrell C. Sanderson has the same due process rights as the YMCA of Metropolitan Chicago and this is the reason Terrell C. Sanderson appears before this Court in this Petition for Rehearing as an appellant.

to challenge the trial judge's decision. [2] This Court has stated at page 14 of its opinion:

> The trial court's findings concerning defense counsel's behavior and remarks during the trial were revealed to the parties six months[2] after the verdict in the first trial, when the court announced its ruling on U S Bank's motion for a new trial It can reasonably be inferred that the trial court may have determined that the issue would be moot if the parties settled the lawsuit through the mediation process it is unfortunate that the trial court did not inform the attorneys when its deputy sheriff informed him of the jurors' comments. However, that failure does not affect the trial court's decision making process in granting U.S. Bank a new trial (slip op. p.14)

This decision cannot stand under the scrutiny of the due process rights guaranteed defendants by both federal and state constitutions and decisional law. Indeed, this Court's decision cannot stand scrutiny under the decisional authorities defendants cited to this Court — which, significantly, this Court never addresses in its opinion These decisions — *People v. Rivers* 410 Ill. 410 (1951); *Takecare v. Loeser*, 113 Ill.

---

[2] The verdict in the first trial for defendants was rendered on May 5, 2004(R.C4135-36). On September 7, 2004, the trial court heard oral argument on plaintiff's post-trial motion. (V29, R.C239) It was not until February 25, 2005 — ten months after the verdict for defendants — that the trial court first revealed what it had kept secret from defendants, that the court's bailiff allegedly told the court that the jurors allegedly overheard sidebar comments and were allegedly in disbelief. (V. 30, R.C22)

App. 2d 149 (1969); and *Loucks v. Pierce*, 341 Ill. App. 253 (1950) — require that this Court vacate Judge Burke's decision and reinstate defendants' verdict because Judge Burke's decision violates the federal and state guarantees of due process. This is what the Supreme Court in *Rivers* stated: "The defendants' constitutional right to have everything considered against them produced in open court has been violated." (410 Ill. at 419) In *Loucks*, this is what the court said about a trial court, such as Judge Burke here, keeping information from litigants:

> Possibly the trial judge received information from his own officers whom he believed to be unprejudiced and reliable. If so, it would be proper to conduct an investigation, but that should be done in [3] open court upon notice to counsel of record. The information obtained should be preserved, either in the form of affidavits or better still by direct testimony duly reported. The rules of evidence should be applied and only persons having actual knowledge of the facts should be heard. (341 Ill. App. at 257)

These decisional authorities, such as *Rivers* and *Loucks*, hold that a record was mandated — and that record should have been made in this case at the time Judge Burke's bailiff allegedly told Judge Burke that the jurors allegedly overheard sidebar comments. Judge Burke never brought this out into the open; nor did His Honor ever go on the record during the trial to say he thought jurors heard sidebar comments. Thus, there is no record during this trial supporting any of Judge Burke's later findings of "repeated" conduct. This kind of decision-making process which this

Appellate Court approves is simply not supported by the openness required by notions of due process. Essentially, defendants were charged, tried and convicted all in one proceeding by Judge Burke, without any opportunity to have any meaningful way of challenging Judge Burke's accusations of attorney misconduct during trial, which were based upon information Judge Burke was keeping to himself all this time.

This kind of decision-making process, which this Appellate Court has upheld, effectively deprives litigants such as defendants of an opportunity to be heard in a meaningful way. The witnesses to any alleged sidebar outbursts were the jurors. The time to have called them to testify was during the trial, when Judge Burke supposedly became possessed of information that the jury allegedly overheard sidebar comments. Even if this was just the judge's own perception, due process required His Honor to make that known to defendants so that the jurors could be interviewed in open court and asked the following:

— Did the jurors actually hear anything?

— If they heard something, what exactly did they hear?

— If they heard any comments, who did they hear making the comments? **[4]**

— And if they heard any comments could they still fairly evaluate the case or had they developed any prejudices or biases after allegedly hearing these comments?

Such an examination of the jurors would have afforded the litigants the openness and fairness due process requires. Keeping this information a secret until ten months after a verdict is issued and a jury is discharged and then using personal recollection to impeach a verdict, effectively foreclosing defendants

from examining the jurors about these issues, is contrary to the notions of fundamental fairness and openness inherent in the due process clauses of the United States and Illinois Constitutions.

One further point.

This Court's statement at page 14 of its opinion, that the trial court may have sat on this information and hoped for a settlement that would moot out the issue, likens the trial court to a clandestine advocate for the plaintiff. Is this why the trial court kept secret this information from defendants — that it became the clandestine advocate for the plaintiff, gambling for a plaintiff's verdict? Is this why the trial court forced mediation following a defense verdict — trying to coerce defendants into paying plaintiff money? The role of a trial judge in our system of jurisprudence should be impartial to either side and
not an advocate for the plaintiff against defendants.

Defendants ask this Court on rehearing to look at the facts of this case through the prism of due process; to look at this case and apply the decisional authorities which defendants cited to this Court, which remain unaddressed. There should be no opinion on our law books approving the decision-making that led to the new trial in this cause.

* * *

Supreme Court, U.S.
FILED
NOV 17 2009
OFFICE OF THE CLERK

No. 09-404

IN THE
Supreme Court of the United States

YMCA OF METROPOLITAN CHICAGO AND
TERRELL C. SANDERSON,

Petitioners,

v.

U.S. BANK, AS TRUSTEE OF THE ROE ANN LOCKHART
OBRA '93 TRUST, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The Appellate Court Of Illinois, First District

REPLY BRIEF FOR THE PETITIONERS

EDWARD M. KAY
PAUL V. ESPOSITO
CLAUSEN MILLER P.C.
10 South La Salle Street
Chicago, IL 60603
(312) 855-1010

THOMAS G. HUNGAR
Counsel of Record
MIGUEL A. ESTRADA
THOMAS M. JOHNSON, JR.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners
YMCA of Metropolitan Chicago, et al.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 2

A. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DUE PROCESS JURISPRUDENCE AND THAT OF OTHER STATE COURTS OF LAST RESORT. 2

B. THE YMCA PROPERLY PRESERVED THE DUE PROCESS ISSUE BELOW. 4

C. THE LOWER COURT DID NOT ISSUE ANY RULING UNDER ILLINOIS LAW THAT WOULD BAR THIS COURT'S REVIEW 10

TABLE OF AUTHORITIES

Page

CASES

Braniff Airways v. Nebraska State Board,
347 U.S. 590 (1954) 5

Brinkerhoff-Faris Trust & Sav. Co. v. Hill,
281 U.S. 673 (1930) 7

Eddings v. Oklahoma,
455 U.S. 104 (1982) 4

Hopt v. Utah,
110 U.S. 574 (1884) 3

Howell v. Mississippi,
543 U.S. 440 (2005) 6

Hux v. Raben,
230 N.E.2d 831 (Ill. 1967) 8

Jackson v. Edwards,
404 F.3d 612 (2d Cir. 2005) 6

Johnson v. Mississippi,
486 U.S. 578 (1988) 9

New York ex rel. Bryant v. Zimmerman,
278 U.S. 63 (1928) 4

People v. Cooper,
75 N.E.2d 885 (Ill. 1947) 5

People v. Molnar,
857 N.E.2d 209 (Ill. 2006) 5, 9

People v. Rivers,
102 N.E.2d 303 (Ill. 1951) 5

People v. Wilson,
614 N.E.2d 1227 (Ill. 1993) 8

Pruneyard Shopping Ctr. v. Robins,
447 U.S. 74 (1980) 7

Richards v. Jefferson County,
517 U.S. 793 (1996) 7

United States ex rel. Rios v. O'Sullivan,
No. 93 C 1151, 1993 U.S. Dist. LEXIS
15166 (N.D. Ill. Oct. 27, 1993) 6

Verdin v. O'Leary,
972 F.2d 1467 (7th Cir. 1992 ..... 6, 7

Williams v. Williams,
130 N.E.2d 291 (Ill. App. Ct. 1955) 5

Willner v. Committee on Character & Fitness,
373 U.S. 96 (1963) 9, 10

REPLY BRIEF FOR THE PETITIONERS

Respondents make no attempt to challenge the YMCA's compelling showing that the Due Process Clause prohibits *ex parte* communications—including communications between a judge and jury—that affect a litigant's substantial rights. Respondents also concede that the trial judge in this case overturned a favorable verdict for the YMCA and granted respondents a new trial in reliance on *ex parte* communications between the judge, deputy sheriff, and sitting jurors. Opp. 4. As the YMCA demonstrated conclusively in its petition, the lower court's ratification of the use of *ex parte* evidence conflicts with this Court's due process jurisprudence and with cases from several state courts of last resort.

Respondents nevertheless seek to prevent this Court's review of this important issue by raising meritless procedural objections and by advancing the novel argument that a party who stands to lose over $15 million as a result of constitutionally impermissible judicial reliance on *ex parte* communications has failed to identify a "property" interest protected by the Due Process Clause. Those arguments do not withstand scrutiny. Review is not only procedurally proper but necessary to resolve the conflicts in authority, clarify that a court may not rely on *ex parte* contacts to affect a party's substantial rights, and correct the manifestly erroneous and unjust rule of law announced by the court below.

ARGUMENT

A. The Decision Below Conflicts With This Court's Due Process Jurisprudence And That Of Other State Courts Of Last Resort.

As the petition demonstrates (Pet. 8-25), Anglo-American history, this Court's case law, and cases from several state courts of last resort establish a time-honored prohibition on *ex parte* communications, such as off-the-record conversations between a judge and jury. This case provides the Court with the opportunity to resolve the conflict between those precedents and the decision below and to clarify the standard for determining which *ex parte* contacts are prohibited. *Id.* at 21-22.

Respondents do not defend the rule of law announced below, which is that a court may make factual findings based on *ex parte* communications as long as those findings are not "directly contradicted" by the record. Pet. App. 14a. Rather, respondents attempt to distinguish the long line of Supreme Court and state cases cited in the petition on the ground that the YMCA has failed to identify a "traditional property interest" protected by the Fourteenth Amendment that was at stake in the new-trial hearing. Opp. 12.

That argument has no merit. Respondents err by presuming that the YMCA must be asserting a property interest in the jury verdict that was overturned as a result of the judge's constitutionally impermissible new-trial ruling. Opp. 14. In reality, the YMCA has a much more basic property interest at stake, namely, the cash value of any resulting adverse judgment—which here amounted to a $15,468,277 award for respondents following a second trial. Respondents concede, as they must, that

"damages" imposed by a court qualify as a traditional property interest. *Id.* at 12.

Respondents' real complaint appears to be that the YMCA's interest in the outcome of the litigation was provisional, "subject to the discretionary authority of trial judges to grant new trials," and therefore supposedly outside the reach of the Due Process Clause. Opp. 16. That argument, however, proves far too much. Under respondents' view, the Due Process Clause would be inapplicable whenever the outcome of litigation is uncertain or a judge is afforded some discretion to issue an interlocutory ruling.

That is not the law. As demonstrated in the petition, a litigant has a right to be present at "*every stage* of the trial when his substantial rights may be affected by the proceedings against him." Pet. 11 (quoting *Hopt v. Utah*, 110 U.S. 574, 579 (1884)) (emphasis added).[1] The YMCA's right to be present and have notice of the jurors' conversations with the bailiff attached at the time the conversations took place—*before* the verdict had been rendered. *Id.* at 4. In any event, the new-trial hearing was certainly a "stage" of the proceedings that affected the YMCA's "substantial rights," and led to the considerable expense of a new trial and a $15 million adverse judg-

---

[1] Respondents claim that the YMCA is ambivalent about the proper test for when *ex parte* communications violate due process. Opp. 14 & n.9. To the contrary, the YMCA's position is clear: The test, derived from this Court's case law, is whether reliance on *ex parte* communications affects substantial rights. Pet. 22. To the extent that this Court's various (functionally similar) formulations of the test could benefit from additional clarification, that fact weighs in *favor* of, not against, a grant of certiorari.

ment. The conflict between this Court's prohibition on *ex parte* communications that affect substantial rights and the contrary standard applied by the court below cannot be avoided, and demands this Court's review.

B. The YMCA Properly Preserved The Due Process Issue Below.

1. Respondents also oppose certiorari on the asserted ground that the question presented was not pressed or passed upon in the Illinois appellate courts. As explained in the petition, however, the YMCA raised its due process claims on at least five occasions—in petitions for interlocutory appeal before the Illinois appellate and supreme courts; in its initial brief and in a petition for rehearing before the Illinois appellate court following the second trial; and in a petition for leave to appeal to the Supreme Court of Illinois. Pet. 4-6. The YMCA did all that was necessary to preserve the issue.

Contrary to respondents' assertion, it was not necessary for the YMCA to specifically use the word "federal" in its initial brief to put the Illinois appellate court on notice of the YMCA's argument based on the federal Constitution. As this Court has stated, in raising a federal constitutional claim, "[n]o particular form of words or phrases is essential." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *see also Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982) (this Court's jurisdiction "does not depend on citation to book and verse"). Rather, "if the record as a whole shows either expressly or by clear intendment" that the federal claim was timely raised, "the claim is to be regarded as having been adequately presented." *Bryant*, 278 U.S. at 67.

In *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 (1954), for example, the petitioner airline had argued before the Nebraska Supreme Court that the State lacked power under the Dormant Commerce Clause to tax property that had not attained a taxable situs within the State. This Court noted that the petitioner "name[d] the wrong constitutional clause to support its position," because "the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process." *Id.* at 598-99. The Court nevertheless reached the due process issue, because the nature of petitioner's challenge, "[t]hough inexplicit," was "within the clear intendment" of the argument. *Id.*

It was undoubtedly the YMCA's "clear intendment" to raise a federal constitutional challenge by relying on *People v. Rivers*, 102 N.E.2d 303 (Ill. 1951), and similar cases in its initial brief. Opp. App. 23a-26a. The case for preservation here is even stronger than in *Braniff Airways* because the YMCA in its initial brief explicitly invoked its "due process rights to a fair and open proceeding." *Id.* at 25a. In addition, cases such as *Rivers* and *People v. Cooper*, 75 N.E.2d 885 (Ill. 1947), which *Rivers* cites, have roots in both the United States and Illinois Constitutions. *See, e.g.*, *Williams v. Williams*, 130 N.E.2d 291, 295 (Ill. App. Ct. 1955) (relying on *Cooper* and holding that "the use of outside investigations and confidential reports contravenes the American ideal of due process of law").

Indeed, absent a compelling reason to construe the state clause more broadly (which respondents do not claim exists here), Illinois courts interpret the state and federal Due Process Clauses identically. *See, e.g.*, *People v. Molnar*, 857 N.E.2d 209, 218 (Ill.

2006). Thus, the YMCA necessarily relied on both state and federal due process principles in raising its due process claims below. This Court has "[a]ssum[ed], without deciding, that identical standards might overcome a petitioner's failure to identify his claim as federal." *Howell v. Mississippi*, 543 U.S. 440, 444 (2005) (*per curiam*). The lower courts have resolved that issue by holding that a federal due process claim is preserved by reliance on a virtually identical state-law standard in state courts. *See, e.g.*, *Jackson v. Edwards*, 404 F.3d 612, 621 & n.3 (2d Cir. 2005) (relying on *Howell* and holding that federal habeas petitioner preserved federal due process claim by citing to virtually identical state-law standard). This Court should reach the same conclusion.

Federal courts have not hesitated to find federal constitutional claims preserved by parties who, like the YMCA, rely on *Rivers* and similar Illinois cases. In *United States ex rel. Rios v. O'Sullivan*, No. 93 C 1151, 1993 U.S. Dist. LEXIS 15166 (N.D. Ill. Oct. 27, 1993), for example, the federal district court held that a federal habeas petitioner, by relying on *Rivers* and other Illinois cases in the state appellate court, had preserved a federal constitutional challenge to *ex parte* communications between a judge and a third party. Although the petitioner had referred only to "due process," and the Illinois cases do not "specifically identify[] whether they are relying on the federal constitution," the claim was preserved because the cases are "concerned with the types of rights protected by [the federal Constitution, such as] the right to confront witnesses, to be present at one's trial, and to have a public trial." *Id.* at *14.

Similarly, in *Verdin v. O'Leary*, 972 F.2d 1467 (7th Cir. 1992), the Seventh Circuit held that a federal habeas petitioner had preserved a federal due

process challenge to *ex parte* communications between a judge and jury by relying exclusively on state cases before the Illinois appellate court and invoking his right "to be present at critical stages of his trial" and "to a fair trial." *Id.* at 1480. Thus, the YMCA preserved its federal due process challenge in its initial brief.

2. In any event, the YMCA also raised the due process issue (with explicit citation to the Fourteenth Amendment and federal case law) in its petition for rehearing. Under this Court's precedents and Illinois law, that fully preserved the federal due process issue. *See, e.g.*, *Richards v. Jefferson County*, 517 U.S. 793, 797 n.3 (1996) ("Because petitioners raised their due process challenge . . . in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review."). As this Court has explained, "federal claims [are held] to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980); *see also Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930).

Here, it was certainly unexpected for the Illinois appellate court to create a completely new and erroneous rule of law governing judicial reliance on *ex parte* communications, namely, that a court may rest its factual findings on such communications as long as they are not "directly contradicted" by the record. Pet. App. 14a. As the YMCA demonstrated in its petition, that standard is the precise opposite of the presumption against reliance on *ex parte* conversations established by this Court and by appellate courts in other states. Pet. 2. For this reason, the YMCA argued in its petition for rehearing that the

appellate court's decision "continues to violate [the YMCA's] rights by sanctioning conduct that is the antithesis of due process guaranteed to defendants by both the United States and Illinois Constitutions." YMCA Pet. for Rehearing at 1. It is the appellate court's erroneous legal standard that created the conflict among the authorities and presented the federal due process violation in sharp relief, thereby making necessary this Court's review.

Respondents argue that it was insufficient for the YMCA to raise the issue in its petition for rehearing because of the purportedly "strict rule" in Illinois that all arguments must be raised in an appellant's initial brief. Opp. 6 (citing Ill. S. Ct. Rule 341(h)(7)). As explained above, the YMCA did raise the federal due process argument in its initial brief. But in any event, the Illinois rule does not prohibit further review of an issue presented later—it is an "admonition to the parties, not a limitation upon the jurisdiction of the reviewing court." *Hux v. Raben*, 230 N.E.2d 831, 832 (Ill. 1967).

For example, in *People v. Wilson*, 614 N.E.2d 1227 (Ill. 1993), the Illinois Supreme Court allowed the State of Illinois to present an argument that the State "did not raise . . . until its petition for rehearing to the appellate court." *Id.* at 1229. Citing *Hux* and other authorities, the Court "recognized that the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent" may override the waiver rules. *Id.* (internal quotation marks and citation omitted). Because the evidence plainly showed that the appellate court had misconstrued the trial record in that case, the Supreme Court reviewed the newly-presented issue "in the interest of justice." *Id.* Because the rule provides Illinois courts with broad dis-

cretion to consider issues not raised in an initial brief, and therefore has not been consistently applied, it does not present a bar to this Court's review. *See, e.g.*, *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (state waiver rule was not an independent and adequate state ground precluding this Court's review because it was not "consistently or regularly applied"). That is particularly so here, where the lower court's unexpected announcement of a new and erroneous rule of law providing courts with wide latitude to rely on *ex parte* communications represented such an egregious departure from this Court's due process jurisprudence.

3. Finally, contrary to respondents' suggestion, the Illinois appellate court both considered and rejected the YMCA's constitutional claim. As the lower court acknowledged, the YMCA argued that it was error for the trial court to fail to conduct a "formal inquiry after being told by the deputy sheriff of the jurors' comments." Pet. App. 14a. The appellate court nevertheless dismissed the argument that a formal inquiry was required. *Id.* Although the court did not explicitly state that it was relying on the federal Constitution, it necessarily decided the federal issue because, as noted above, the Illinois Due Process Clause includes all the protections of its federal counterpart. *See Molnar*, 857 N.E.2d at 218.

The lower court's opinion should not be insulated from review merely because the court failed to provide more extended analysis. This Court recognized as much in *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963), in which it granted certiorari to review a due process challenge to the denial of an application for bar admission based in part on *ex parte* communications—even though the lower courts had provided no analysis of the federal constitutional

issue. In that case, the New York Court of Appeals initially affirmed without opinion, but later amended to clarify briefly that "appellant was not denied due process in violation of [his] constitutional rights." *Id.* at 102. Despite the brevity of the decision, this Court determined that the due process issue was "necessarily decided" by the lower court. *Id.* at 106. The same reasoning applies here.

C. The Lower Court Did Not Issue Any Ruling Under Illinois Law That Would Bar This Court's Review.

Finally, respondents argue that certiorari should be denied because the lower court purportedly issued an "authoritative ruling" under Illinois law that the YMCA's constitutional claim was barred because it failed to create an evidentiary record to challenge the court's factual findings based on the illicit *ex parte* conversations. Respondents are mistaken.

First, the lower court made no such ruling. It merely observed that, in its view, the YMCA's due process challenge was "weakened" by the absence of a record refuting "the trial court's findings regarding defense counsel's behavior during trial." Pet. App. 16a. The appellate court did not hold or suggest that its passing observation constituted a procedural bar to the consideration of the merits of the YMCA's due process claim. To the contrary, the court proceeded to address and resolve that claim on the merits by adopting the egregiously erroneous rule of law that trial courts may rely on *ex parte* evidence as long as it "was not contradicted by the record." *Id.*

Second, the lower court did not hold that it was possible, ten months after the jury had been dismissed, for the YMCA to specifically refute the findings of juror prejudice derived from the judge's *ex*

parte conversations. At the time of the court's new-trial ruling, it would have been impracticable to reassemble the jury and elicit reliable testimony about the effect of trial counsel's remarks on the verdict. Since the time of the *ex parte* communications, much had changed: The intervening deliberations and the substantial passage of time since the verdict undoubtedly affected the jurors' recollection and state of mind. As the trial judge acknowledged, at the time of the new-trial ruling, "[t]he outcome, the verdicts could have, might have been the same. I and we will never know." Pet. App. 34a. The judge's prolonged silence about the illicit *ex parte* contacts irreparably prejudiced the YMCA's ability to establish the impartiality of the verdict.

Because the appellate court placed its imprimatur on the trial court's actions, and in so doing announced a rule of law that conflicts with precedents of this Court and other state appellate courts, this Court's review is essential to vindicate the YMCA's due process rights and clarify this Court's longstanding prohibition against reliance on *ex parte* communications.

* * *

For the foregoing reasons, and those stated in the petition, certiorari should be granted.

Respectfully submitted.

EDWARD M. KAY
PAUL V. ESPOSITO
CLAUSEN MILLER P.C.
10 South La Salle Street
Chicago, IL 60603
(312) 855-1010

THOMAS G. HUNGAR
Counsel of Record
MIGUEL A. ESTRADA
THOMAS M. JOHNSON, JR.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

November 17, 2009